

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment	)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost	)	
of Broadband Deployment by Improving	)	
Policies Regarding Public Rights of Way and	)	
Wireless Facilities Siting	)	

**REPLY COMMENTS OF THE CITY OF PORTLAND, OREGON**

<p>Mary Beth Henry Deputy Director <b>Office for Community Technology</b> 1120 SW 5<sup>th</sup> Avenue Portland, Oregon 97204 (503) 823-5414 <a href="mailto:MaryBeth.Henry@portlandoregon.gov">MaryBeth.Henry@portlandoregon.gov</a></p>	<p>Benjamin Walters Chief Deputy City Attorney <b>City Attorney's Office</b> Room 430 1221 SW 4th Avenue Portland, OR (503) 823-4047 <a href="mailto:ben.walters@portlandoregon.gov">ben.walters@portlandoregon.gov</a></p>
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## SUMMARY

Industry commenters claim that the City of Portland, like many other communities, is delaying broadband deployment and adoption. The industry claims ignore the most pertinent facts:

- Portland is the most competitive broadband market in Oregon;
- Broadband is widely available throughout the City from a multiplicity of providers;
- Studies show that the City's policies and pricing have not deterred broadband, but instead have resulted in far more competition, and far more deployment, than in other cities of comparable size; and
- The City's approach to wireless siting and to right-of-way franchising make it simple to apply for a franchise or for a wireless site – and many companies have successfully done so.

Moreover, the commenters' factual allegations generally are either wrong or fail to advise the Commission of key facts. Notably, Verizon's claims regarding in-kind contribution requirements have been litigated; the facts as found by the courts are simply not as Verizon describes them; and Verizon should have been well aware that it was repeating allegations that had been discredited.

Substituting the very successful system in Portland with a different federally mandated system will only add costs and delay. For example, issues that can now be handled locally and resolved through meetings with the principals would become federal issues; and rules that now can be modified based on local circumstances and conditions would become tied to Commission rules. There is no reason to believe the rules would be effective.

On the other hand, as the City and national association commenters pointed out initially, there are educational/voluntary activities the Commission could undertake that may be helpful, and there are areas where the Commission can assist communities by providing and updating information that addresses matters such as RF emission concerns. Convening forums to discuss deployment issues with local government and industry would also be helpful. The Commission can take immediate action in these areas.

Furthermore, as Portland pointed out in its initial comments, Portland and many other communities are seeking to find the best way to encourage broadband adoption and deployment through local broadband planning that can serve as a laboratory for national solutions. Federal rules will simply undercut those efforts. To really understand why local models work well – and why they should be encouraged – we invite the Commission to visit Portland to learn more about the City’s efforts to promote broadband deployment, and more importantly, to speak directly with the neighborhoods and communities the City and communications providers serve in order to hear first-hand about their experiences and needs for telecommunications and broadband capability. Given the seriousness of the actions proposed by industry, firsthand local public hearings are critical to this process.

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**REPLY COMMENTS OF THE CITY OF PORTLAND, OREGON**

The City of Portland, Oregon (the “City”) files these reply comments in the above-captioned proceeding.

**I. THE WIDESPREAD DEPLOYMENT OF BROADBAND IN PORTLAND BELIES INDUSTRY’S ALLEGATIONS THAT THE CITY IS DELAYING DEPLOYMENT AND ADOPTION**

Industry commenters insist that the City of Portland and other communities are delaying broadband deployment and adoption. More specifically:

- Verizon claims the City’s in-kind contribution requirements subsidize the City’s own communications network and hinder deployment by the private sector.
- NextG alleges that the City’s charges to use the right-of-way for wireless services are an unreasonable barrier to deployment.
- CenturyLink claims the City’s revenue-based franchise fees deter deployment.
- PCIA includes the City on two lists – one list of jurisdictions that require discretionary zoning hearings for all collocations, and another list of jurisdictions with “right-of-way issues” because the City requires tower companies to meet with affected neighborhoods.

The industry claims ignore indisputable facts:

- Portland is one of the most robust competitive broadband markets in the country, ranking number 10 on the most recent Forbes list of America's Most Wired Cities.<sup>1</sup>
- Broadband is widely available throughout the City from a multiplicity of providers.
- Studies show that the City's policies and pricing have not deterred broadband, but instead has resulted in far more competition, and far more deployment, than in other cities of comparable size.
- A simple review of the City's website shows that the City's approach to wireless siting and to right-of-way franchising make it simple to apply for a franchise or for a wireless site – and many companies have successfully done so.<sup>2</sup>

The critical, factual allegations made by some of the commenters have been litigated, and decided in the City's favor based on facts (outcomes conveniently ignored by the commenters). In fact, as we explain below, Verizon is simply re-alleging claims that were specifically rejected after extended court proceedings.

We do not believe that the Commission has authority to regulate as requested by the commentators. But even if the Commission had authority to regulate prices for access to rights of way, or to establish national standards for right-of-way management, or to establish additional standards for siting wireless facilities, it should not do so. There is no demonstrated need: the facts are that local right-of-way practices and compensation are not deterring or delaying

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<sup>1</sup> The overall ranking was based on these achievements: Broadband adoption: 66%; Number of broadband providers: 14; People per WiFi hotspot: 4,165. See J. Bruner, *Interactive: America's Most Wired Cities*, Forbes Magazine, <http://www.forbes.com/2010/03/02/broadband-wifi-telecom-technology-cio-network-wiredcities-map.html> (last accessed September 29, 2011).

<sup>2</sup> The City of Portland's website has links for franchise application, standard franchise provisions, franchisee contacts, and lists of competitive and wireless telecommunications providers. <http://www.portlandonline.com/cable/index.cfm?c=33150>

deployment. Any specific disputes can be decided in the courts, based on specific facts. Moreover, substituting the very successful system in Portland with a different federally mandated system will result in higher costs and significant delays. For example, issues that are now handled locally and resolved through meetings with the principals would become federal issues; and rules that now can be modified based on local circumstances and conditions would become tied to Commission rules. As the City and national association commenters pointed out initially, there is room for voluntary activities, and there are areas where the Commission can assist communities, for example, by providing and updating information that addresses matters such as RF emission concerns.<sup>3</sup> The Commission should do so.

Additionally, the Commission should encourage regional industry forums to bring together local governments and industry representatives to talk about deployment issues. Portland has attempted to do so with mixed success. In June 2011, the City convened such an Industry Forum and invited all wireline and wireless facilities-based providers to attend to discuss their broadband plans for Portland, to get feedback on Portland's draft "Broadband Strategic Plan" and to identify any issues. The City was pleased that eight wireline companies attended the meeting, and the participants said they thought the meeting was very worthwhile. In fact industry attendees asked the City to convene additional forums. However, no wireless companies attended the Industry Forum. No wireless industry representatives even responded to

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<sup>3</sup> *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights-of-Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management Association (July 18, 2011) ("National Associations' Comments"), 41.

our emails or returned our phone calls. Thus we are hopeful that Commission support for such industry forums may encourage broader industry participation.

As Portland and many other communities seek to find the best way to encourage broadband adoption and deployment through local broadband planning, federal encouragement of locally-run forums where industry and communities can discuss issues would be helpful. Federal rules, on the other hand, will simply undercut our local efforts. To really understand why local models work well – and why they should be encouraged – we invite the Commission to visit Portland to learn more about the City’s efforts to promote broadband deployment, and more importantly, to speak directly with the neighborhoods and communities the City and communications providers serve in order to hear first-hand about their experiences and needs for telecommunications and broadband capability. Given the seriousness of the actions proposed by industry, firsthand local public hearings are critical to this process.

## **II. VERIZON’S ALLEGATIONS ARE REHASH OF ARGUMENTS THAT WERE FACTUALLY TESTED AND REJECTED BY THE COURTS**

Verizon attempts to convince the Commission that cities are putting up obstacles to private providers’ access to public rights-of-way and that these obstacles are a “significant and growing problem.”<sup>4</sup> It suggests that Portland is one of “a number of localities [who] abuse their authority over public rights-of-way, which thus impedes broadband deployment.”<sup>5</sup> Specifically, Verizon accuses the City of “abusive” practices such as:

- requiring “in-kind donations that allow it to compete with the donating provider,”

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<sup>4</sup> *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights-of-Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of Verizon and Verizon Wireless (July 18, 2011) (“Verizon’s Comments”), 16-25.

<sup>5</sup> *Id* at 16.



- having “built [a fiber optic] network in part by requiring in-kind contributions from private providers under permits or franchise agreements, which subsidizes the municipal network and allows it to undercut the providers with which it competes”,
- “requir[ing] terms in its rights-of-way agreements that allow it to access surplus conduits, free of charge” and
- being able, for new construction, to “notify providers if it wants conduit placed alongside the providers’ conduit” and while paying only “the incremental cost (for materials and labor) for that conduit...[an] amount represent[ing] only a fraction of the providers’ actual construction costs.”<sup>6</sup>

The trouble with Verizon’s one paragraph recitation of “abuses” is it seriously misconstrues the situation in Portland, and rehashes old arguments that have been rejected in court cases concerning the City’s in-kind contribution requirements and its Integrated Regional Network Enterprise (IRNE), the fiber optic network to which Verizon refers without name. The debate Verizon is seeking to re-ignite was part of an effort to shut down a municipal network that provided a middle mile alternative that private companies were not willing to provide.

In its paragraph of commentary about Portland, Verizon cites two decisions in one case brought by Time Warner Telecom and Qwest against the City, but this is just the tip of the iceberg.<sup>7</sup> As part of the cases, the City and the providers presented a significant amount of

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<sup>6</sup> *Id* at 23.

<sup>7</sup> These court decisions include: *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002); *aff’d in part, rev’d in part, remanded by Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004); *cert denied by City of Portland v. Qwest Corp.*, 544 U.S. 1049 (2005); *on remand Qwest Corp. v. City of Portland*, 2006 U.S. Dist. LEXIS 70763 (D. Or. 2006); *Time Warner Telecom of Or., LLC v. City of Portland*, 452 F. Supp. 2d 1103 (D. Or. 2006); *Time Warner Telecom of Or., LLC v. City of Portland*, 452 F. Supp. 2d 1107 (D. Or. 2006); *denied in part, aff’d in part by Time Warner Telecom of Or., LLC v. City Of Portland*, 322 Fed. Appx. 496

evidence regarding the City's policies, and their impact on providers and provision of services. To give a sense of the extent of this record: the City spent more than half a million dollars on experts and legal fees to defend its franchising practices and IRNE against multiple attacks by private providers over seven years. The City not only won on most issues but also obtained judgments and settlements totaling nearly \$5 million.<sup>8</sup>

To gain a full understanding of the litigated matters one would have to read thousands of pages of transcripts, declarations, expert reports, court briefs and decisions. Verizon essentially repeats allegations made by providers who sought to use Section 253 to shut down IRNE, while failing to mention, or even acknowledge that the facts did not support those claims. To understand what incumbents like Verizon are attempting to accomplish through these allegations, and why Verizon might provide a misleading summary that ignores what the courts found, it is useful to provide some factual background.

In the mid-1990's, as part of the State's participation in the Federal Department of Transportation Intelligent Highway Program, officials of Portland's Bureau of Transportation (PBOT), the regional transportation system, Tri-Met, and the Oregon Department of Transportation began planning ways to coordinate their communications systems. The City, which was also examining ways to modernize its own communications infrastructure, began to realize that by connecting diverse fiber optic resources controlled by a variety of local governments and government agencies, it could vastly increase data transfer capability throughout the region. In 2002, the City Council devoted \$11 million in bonds to construct and

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(9th Cir. 2009); *cert. denied by Time Warner Telecom v. Portland*, 2009 U.S. LEXIS 9073 (U.S. 2009); *Portland v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049 (D. Or. 2005).

<sup>8</sup> Many of the court decisions and related materials are available online on the City's Cable and Franchise Management office webpage under a link titled "Lawsuits and Litigation" which can be viewed at this link: <http://www.portlandonline.com/cable/index.cfm?c=47566> (last accessed September 29, 2011).

implement a regional network. The private sector was not ignored in this process – the City actually asked private providers to submit proposals for a network, but none were willing or able to provide a system that would provide the capacity offered by the proposed regional interconnect (as the City pointed out in its initial comments, the providers were wedded to a service model that makes it more expensive to use broadband capabilities – a model that *is* a barrier to broadband deployment and adoption<sup>9</sup>).

IRNE was created, and entered into 13 Intergovernmental Agreements (IGAs) with state and local agencies. It received a certificate of authority from the Oregon Public Utilities Commission to operate as a CLEC. It sought and obtained a franchise from the City of Portland, similar in most particulars to franchises granted to other CLECs – it pays a franchise fee equal to 5% of its gross revenues, for example. IRNE now provides voice and data communications for all City departments, and also provides high speed data services to several state and local agencies (1 Gb speeds are supported for less than \$1000 per month). IRNE also provides a connection to a telecommunications hotel in downtown Portland. Users connected to IRNE can therefore select among data and telecommunications service providers for access to the PSTN and/or to the Internet. As the federal courts concluded, IRNE actually *increases* competitive alternatives by allowing customers to reach providers who do not have the resources to build out the entire community. The industry’s assertion that IRNE somehow suppresses competition is a complete fallacy.

IRNE only serves governmental entities; it does not serve the general public. It is nonetheless understandable why industry would want to object to large data users having a

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<sup>9</sup> *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights-of-Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of the City of Portland, Oregon (July 18, 2011) (“Portland’s Comments”), 19.

competitive alternative that departs from traditional service-based pricing models. Several providers, most notably Qwest and Time Warner Telecom, brought suit under Section 253, arguing that the City's actions with respect to IRNE were prohibitory, and not saved by either Section 253(b) or (c).<sup>10</sup>

Among other things, providers argued that the City was extracting franchise fees and “in-kind” benefits from other providers that were used to subsidize IRNE, and which made competition impossible. The claims – repeated by Verizon – rested on three fundamental misunderstandings.

First, it assumed it was “prohibitory” for government to use funds and resources obtained in payment for use of government property to “compete” with the private sector. As it happens, franchise fees go into the general fund and are not dedicated to IRNE or any other City enterprise. More fundamentally, no one questions the right of private sector entities to charge competitors for use of their property and use those funds to compete against them. Thus, Qwest is entitled to charge Level 3 for use of Qwest's property (including rights of way) and services, and Qwest may use the funds obtained to compete with Level 3. The notion that it is “prohibitory” to use funds obtained from use of one's assets to compete cannot be squared with basic market principles. The argument was properly rejected by the courts as being factually and legally without merit.<sup>11</sup>

Second, under the City's franchise agreement with Comcast, Comcast provides an Institutional Network (I-Net) that connects all the Portland public schools. The schools then

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<sup>10</sup> *Time Warner Telecom of Or., LLC v. City of Portland*, 452 F. Supp. 2d 1103 (D. Or. 2006).

<sup>11</sup> *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002); *aff'd in part, rev'd in part, remanded by Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004); *cert denied by City of Portland v. Qwest Corp.*, 544 U.S. 1049 (2005); *on remand Qwest Corp. v. City of Portland*, 2006 U.S. Dist. LEXIS 70763 (D. Or. 2006)

connect to IRNE, and can use the IRNE network (as noted above) to obtain competitive alternatives for access to the public switched network (PSTN) and the Internet. Schools are charged to use the I-Net, and the fee is split between Comcast and the City. The provision of an I-Net obviously cannot violate Section 253 (since it is expressly permitted under the Cable Act); nonetheless, Qwest and TWT rested much of their case, and claims regarding “in-kind contributions” on the existence of the I-Net.<sup>12</sup> Verizon appears to repeat the error.

Third, as part of the compensation for use of the rights of way, the City had required a cash payment, and (where the provider was installing conduit and opening trenches) installation of conduit for the City. However, this conduit was not dedicated to IRNE. Only about 11% of the IRNE system (representing about 1% of its construction costs) is located in conduit dedicated to the City. Indeed, in the District Court decision cited by Verizon, the judge found “the in-kind compensation does not form a significant part of IRNE's network.”<sup>13</sup> The courts found that a conduit requirement could be applied in a non-discriminatory manner and consistent with Section 253(c); but more importantly, found that the requirement was not prohibitory or effectively prohibitory.<sup>14</sup>

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<sup>12</sup> *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002); *aff'd in part, rev'd in part, remanded by Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004); *cert denied by City of Portland v. Qwest Corp.*, 544 U.S. 1049 (2005); *on remand Qwest Corp. v. City of Portland*, 2006 U.S. Dist. LEXIS 70763 (D. Or. 2006); *Time Warner Telecom of Or., LLC v. City of Portland*, 452 F. Supp. 2d 1107 (D. Or. 2006); *denied in part, aff'd in part by Time Warner Telecom of Or., LLC v. City Of Portland*, 322 Fed. Appx. 496 (9th Cir. 2009); *cert. denied by Time Warner Telecom v. Portland*, 2009 U.S. LEXIS 9073 (U.S. 2009)

<sup>13</sup> *Time Warner Telecom of Or., LLC v. City of Portland*, 452 F. Supp. 2d 1084, 1095 (D. Or. 2006) (“TWT”).

<sup>14</sup> *Time Warner Telecom of Or., LLC v. City Of Portland*, 322 Fed. Appx. 496, 498 (9th Cir. 2009) (“The in-kind requirements that Qwest challenges, which were provided to the City twelve years ago, do not vest the City with broad discretion, and they do not have the effect of prohibiting the provision of telecommunications services, as demonstrated by Qwest's continued operation.”).

In essence, Verizon is asking the Commission to re-litigate these cases and base federal policy on its inaccurate characterization of the record. Level 3 separately asks the Commission to adopt a standard for Section 253 review that would overturn the *Portland* cases by allowing providers to escape altogether the need to show that there is an actual or effective prohibition.<sup>15</sup>

There are numerous legal reasons why the Commission should not change the existing Section 253 standards, much less re-litigate the *Portland* cases. First, the courts, led by the Eighth and Ninth Circuits, have adopted the same standard for Section 253 cases that is used by the Commission. Second, the request is based on a reading of Section 253 that the Commission and most courts of appeals have rightly rejected.<sup>16</sup> Third, the record does not show that broad interpretative rulings are necessary.<sup>17</sup> Fourth, Congress made clear that the

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<sup>15</sup> *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights-of-Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of Level 3 Communications, LLC (July 18, 2011) (“Level 3’s Comments”). Level 3 asks the Commission to allow a provider to show a “prohibition” based on the assumption that the same compensation scheme is adopted by every community in the country. Any claim of prohibition would have to be litigated based entirely on hypotheticals (there is no reason to suppose that the scheme would be adopted, and every reason to suppose it is nonsense.) The Level 3 NYSTA contracts, agreed to by Level 3’s predecessor, and then accepted by Level 3 voluntarily through bankruptcy proceedings are more than a decade old. If Level 3’s theories were correct, every community in the United States would be charging on exactly the same basis as NYSTA, and instead, as far as Level 3’s response shows, not a single entity has done so. Further, Level 3’s approach would be based on the assumption that if it is prohibitory to charge a particular rate in the most rural parts of America, the rate must also be too high when charged in an urban area. That is, the proposal starts from the proposition that all land is equal – another proposition that is unsupportable. Level 3 is simply trying to avoid showing what it should be able to show that a fee has or will have a prohibitory impact on its ability to compete. *See also, In the Matter of Level 3 Communications, LLC; Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253*, FCC Docket No. WC 09-153.

<sup>16</sup> *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002); *aff’d in part, rev’d in part, remanded by Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004); *cert denied by City of Portland v. Qwest Corp.*, 544 U.S. 1049 (2005).

<sup>17</sup> *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights-of-Way and*

Commission lacks jurisdiction to assess state or local government right-of-way compensation and management under Section 253(c).<sup>18</sup>

But there are also numerous policy reasons why the Commission should not adopt rulings that would allow providers to raise new challenges to IRNE, to I-Nets, or more broadly, to efforts by municipalities that are creating new middle mile opportunities. IRNE provides services, and connections that incumbents had no incentive, and were not willing to provide. Exposing municipal networks to new federal litigation based on a revision of Section 253 will not result in improving broadband deployment; it will result in discouraging the development of networks that can spur broadband use by critical, anchor institutions.

In light of this limited recitation of the actual facts and decisions, it should be clear that this example does not support Verizon's thesis that cities are putting up obstacles to broadband deployment because in-kind requirements are demonstrably *not* an obstacle, they are *not* a significant problem and they are *not* a growing problem. In fact, they are not a problem in any sense, because, as the City noted above, it enjoys the most competitive broadband market in Oregon.<sup>19</sup>

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*Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management Association (July 18, 2011) ("National Associations' Comments") at 53-62.

<sup>18</sup> These reasons are explained in more detail in filings in the Level 3 docket including, Comments of The National Association of Telecommunications Officers and Advisors (filed October 15, 2009); Reply Comments of The National Association of Telecommunications Officers and Advisors and The International Municipal Lawyers Association (filed November 5, 2009).

<sup>19</sup> Portland's Comments at ii.

### **III. NEXTG’S ATTACK ON THE CITY’S RIGHT-OF-WAY FEES MISSTATES THE FACTS AND SHOULD ALSO BE REJECTED BY THE COMMISSION**

In its comments, NextG takes aim at another alleged barrier to broadband deployment – what it describes as “patently unreasonable charges” by local governments, including Portland.<sup>20</sup> NextG has a franchise that allows it to install a fiber optic-fed distributed antenna system in the City’s rights of way.<sup>21</sup> NextG labels the City’s charges to use the public rights-of-way for this purpose as “expensive”, and then makes a series of claims that create an inaccurate impression as to the charges it must pay. NextG claims it must pay annual franchise fees based on a percentage of total revenue or mile of fiber “plus” a \$10,000 annual use fee; a \$3000 fee per pole per year; a \$2,000 one time application fee per pole; and an audit fee not to exceed \$5,000 once every five years. NextG also complains it must post a \$10,000 perpetual bond and a \$10,000 construction bond.<sup>22</sup>

All the fees complained of, with two exceptions (the \$2000 per pole permit application fee and the \$3000 per pole per year fee) are spelled out in the NextG franchise agreement with Portland, and were agreed to by the company.<sup>23</sup> It is not clear from NextG’s comments whether it

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<sup>20</sup> *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights-of-Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of NextG Networks, Inc. (July 18, 2011) (“NextG’s Comments”), 13-16.

<sup>21</sup> See Ordinance No. 180377, Grant a Franchise to NextG Networks of California, Inc., doing business as NextG Networks West, for five years for Telecommunications Services, and establish terms and conditions (Ordinance), Section 3, which is available online here: <http://www.portlandonline.com/cable/index.cfm?a=128432&c=34422>. The franchise was recently renewed on similar terms. Ordinance No. 184797 (adopted by the Portland City Council on August 10, 2011, effective September 10, 2011) <http://tinyurl.com/Ordinance184797>.

<sup>22</sup> *Id.*

<sup>23</sup> As discussed below, the \$2000 per pole permit application fee does not apply to NextG and is not a franchise fee, and the \$3000 per pole per year fee is a type of franchise fee that is not applicable to NextG’s franchise.



believes the fees in its franchise are excessive individually or cumulatively. But in any case, NextG's discussion is not accurate.

For the record, NextG's franchise requires it to pay annual fees for use of the right-of-way of 5% of gross revenues or \$10,000, whichever is greater.<sup>24</sup> Thus, these are alternative fees, not cumulative fees as NextG portrays them. NextG also wrongly claims it is also required to pay annual \$3000 per pole fees.

The audit fee is in Section 3.E. of the franchise. NextG only pays audit costs if the audit reveals a serious shortfall in franchise payments. Thus, if the audit reveals that NextG had paid 95% or less of the franchise fees owing for the period, it must pay all of the audit costs not to exceed \$5000. If the audit reveals NextG had paid more than 95% but less than 98% of the franchise fees owing for the period, NextG must pay half of the audit costs not to exceed \$5000. To put it another way: if NextG accurately reports and pays its franchise fees, the City bears the cost of the audit; but if the audit shows the company is not in material compliance with its obligations, the company pays. This rewards companies that comply with fee obligations, while ensuring that a provider cannot advantage itself by paying less than it is owed, and forcing the City to incur costs to catch the error. The fee is completely avoidable by simply accurately and

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<sup>24</sup> The \$10,000 minimum charge is a minimum threshold for occupancy of the right-of-way. This minimum charge is set applying a "market" approach to encourage franchisees to deploy promptly, rather than take a franchise which sits dormant and serves to discourage other potential entrants. This is not unlike the economic thinking behind Commission use of spectrum auctions rather than lotteries to incentivize rapid deployment rather than speculation or hoarding. For example *see* Gregory L. Rosston and Jeffrey S. Steinberg, "Using Market-Based Spectrum Policy to Promote the Public Interest", (FCC January 1997), <http://wireless.fcc.gov/auctions/data/papersAndStudies/spectrum.txt>; FCC Report to Congress on Spectrum Auctions, FCC 97-353, (rel. October 9, 1997), <http://wireless.fcc.gov/auctions/data/papersAndStudies/fc970353.pdf>; Evan Kwerel, Spectrum Auctions Do Not Raise the Price of Wireless Services: Theory and Evidence (FCC OPP, October 2000), <http://wireless.fcc.gov/auctions/data/papersAndStudies/SpectrumAuctionsDoNotRaisePrices.pdf>.

appropriately reporting revenues subject to the contractual obligation. Moreover, this is a common contractual requirement uniformly required in Portland franchise agreements.

The franchise's bond requirements – a \$10,000 performance bond and a \$10,000 construction bond (the latter required during all times when NextG is performing any construction work above, in or under the streets requiring a street opening permit)– are standard franchise terms imposed on all users of the right of way for the protection of the public. They give the City some protection in case of non-performance – for example by covering some of the costs if a provider causes damage in the rights of way or abandons facilities. The City has been forced to absorb these costs in the past – it happened with MetroFi.<sup>25</sup> A city cannot be expected to bear the risk of non-performance of such vital matters as road repair or removal of facilities (if the cost of a bond is really so burdensome, it is highly questionable as to whether NextG is a viable operation, as even a small incident could easily result in costs equivalent to the value of the bond). NextG offers no reasons as to why it should be accorded special treatment as compared to other users of rights of way, or why the bond amount is unreasonable.

The franchise fees discussed above are compensation for use of the rights of way. The management of the rights of way – including the review of applications for compliance with building code and other applications – involves the exercise of the police power. The City Code requires a review of the placement of antennas in the rights of way for police power purposes, and the City Code requires a wireless provider must pay for review of its plans to site antennae at particular locations, whether on public or private property. Thus, what NextG calls the \$2000

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<sup>25</sup> Mike Rogoway, “Defunct Wi-Fi antennas – Portland’s next landmark?”, *The Oregonian* (April 9, 2009) (noting that MetroFi’s bond of \$30,000 would be insufficient to cover costs of removing installed antennas from city streetlights and signals.)

[http://blog.oregonlive.com/siliconforest/2009/04/defunct\\_wifi\\_antennas\\_portland.html](http://blog.oregonlive.com/siliconforest/2009/04/defunct_wifi_antennas_portland.html)

See Portland’s Comments at 11 for further discussion. In that instance the bond was insufficient to cover the City’s removal costs.

one time per pole application fee is a standard fee for permits related to installation of large facilities that require extensive review. Based on the City's understanding of the type of smaller facility NextG intends to install, NextG would not be subject to this fee. As mentioned in the City's initial comments, permit fees are required by state law to recover costs of processing the application only, and the costs charged are designed to recover those costs. As the City explained in its initial comments, it has adopted a pro-active, and highly praised approach to siting that requires significant effort. NextG cannot and does not claim that the fees actually exceed City costs.

The fees clearly have not hindered deployment by other wireless providers. Today, there are a total of 67 antennas and wireless attachments in active use on utility poles in the City's streets.<sup>26</sup> It is possible, of course, that NextG wants to negotiate a different fee structure with the City for its own business purposes. But the fact that NextG may not like the fee does not alter the fact that it is in place, and has not prohibited others from providing service. Legally, it is certainly not appropriate to find a fee unlawful based on "speculation" as to a particular provider's cost structure.<sup>27</sup> Thus, the Commission can and should disregard NextG's claims that the City's fees are a barrier to broadband deployment. NextG has not made any case.

#### **IV. THE COMMISSION SHOULD REJECT CENTURYLINK'S UNSUBSTANTIATED CLAIM THAT REVENUE-BASED FRANCHISE FEES HINDER BROADBAND DEPLOYMENT**

Although it does not name the City of Portland specifically, CenturyLink characterizes revenue-based fees charged by Oregon's home rule cities (like Portland) as "excessive" and a

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<sup>26</sup> Portland's Comments at 11.

<sup>27</sup> *MCI Telecomms. Corp. v. U.S. West Communs.*, 204 F.3d 1262, 1270-1271 (9th Cir. 2000)

barrier to deployment.<sup>28</sup> CenturyLink offers no real evidence to support its claim that the fees are excessive; rather at most it argues that “cost-based fees...allow for streamlined permitting and ready deployment of infrastructure.”<sup>29</sup>

The problem with CenturyLink’s argument is that the facts actually show there is no connection between the fees Portland charges and more streamlined permitting or greater broadband deployment. The cases cited above involved claims by CenturyLink’s predecessor, Qwest, that the fees being charged in several Oregon cities, including Portland, prohibited or effectively prohibited the provision of services. Factually those claims failed – the company was unable to identify a single service that it had, or would be effectively prohibited from providing as a result of the charges. In the context of the federal litigation, responding in discovery requests, Qwest was not able to factually identify any delay resulting from the City’s franchise fee, or from any other provision of Portland’s franchise agreement or City Code provisions. To the contrary, Portland has been praised as “one of the best cities to work with in regard to permitting.”<sup>30</sup> It is also has the most competitive telecommunications market in the state, a fact consistently re-affirmed by annual studies conducted by the Oregon Public Utility Commission.<sup>31</sup>

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<sup>28</sup> *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights-of-Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of CenturyLink (July 18, 2011) (“CenturyLink’s Comments”), 4-9.

<sup>29</sup> CenturyLink’s Comments at 6.

<sup>30</sup> Portland’s Comments at 9. The industry comment was made by a representative of TW Telecom at the Broadband Strategic Plan Industry Meeting held on June 3, 2011, City Hall 1221 SW 4th, Council Chambers. A transcript is available upon request.

<sup>31</sup> The Oregon Public Utility Commission has been conducting surveys of competition in the local telecommunications market within the state since 2003. <http://www.oregon.gov/PUC/telecom/telerpts.shtml> (last accessed September 28, 2011). For example, *see*, Oregon Public Utility Commission Local Telecommunications Competition Survey – Year 2010 Report [http://www.oregon.gov/PUC/telecom/2010\\_Telecommunications\\_Competition\\_Survey.pdf](http://www.oregon.gov/PUC/telecom/2010_Telecommunications_Competition_Survey.pdf)

CenturyLink claims the “cost-based” fees in Colorado, Washington, Arizona, Iowa and Minnesota “allow for streamlined permitting and ready deployment of infrastructure.”<sup>32</sup> But the company provides no figures that actually show broadband deployment levels in these states are higher than in Oregon, with its “non-cost based” franchise fees. In fact, the statistics do not support CenturyLink’s claim. The National Associations’ Comments included a comparison of broadband levels in Oregon and Colorado that showed broadband deployment in Oregon surpasses deployment in Colorado.<sup>33</sup>

There is no evidence that Portland’s fees have deterred, and substantial evidence that the structure actually has increased the vitality of the communications marketplace. For example, economist Alan Pearce, Ph.D., analyzed the City of Portland’s telecommunications market against the markets in various other similarly situated cities, including Charlotte, NC; Cleveland, OH; Denver, CO; and Kansas City, MO. Portland charged providers for the use of its rights-of-way, and required carriers to make “in-kind” contributions. Many of the other cities that Dr. Pearce analyzed did not impose any such right-of-way compensation requirements. Yet Dr. Pearce found: “An examination of the relative numbers of competitive telecommunications service providers in the comparable cities clearly demonstrates that the city of Portland has a relatively large number of competitive providers. . . .”<sup>34</sup> That is, there is no evidence that charging fees actually discourages deployment.

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<sup>32</sup> CenturyLink’s Comments at 6.

<sup>33</sup> National Associations’ Comments at 11.

<sup>34</sup> Expert Report of Alan Pearce, Ph.D., *Time Warner Telecom of Oregon, LLC v. City of Portland*, CV 04- 1393 (D. Or. 2006), attached hereto as Exhibit 1.

Thus, a more likely explanation for the varying deployment levels is the one offered by the comments and expert studies filed by the National Associations– *there simply is no correlation between right of way fees and broadband deployment.*<sup>35</sup>

**V. CRITICISMS OF THE CITY ON PCIA’S “PROBLEMS LISTS” ARE WITHOUT MERIT AND SHOULD BE DISREGARDED**

PCIA includes the City on two of its problems lists, and in both cases the inclusion is questionable, raising fundamental questions as to the reliability and accuracy of PCIA’s lists as a whole.

**A. PCIA Mischaracterizes The City’s Collocation Review**

PCIA includes Portland on its list of jurisdictions that allegedly require applicants for collocations to go through a full zoning review and hearing and obtain a variance or special use permit for each new collocation on a tower regardless of the status of the existing tower.<sup>36</sup> Quite simply, this is not correct. The City encourages collocation.<sup>37</sup> According to the Portland City Code, “Facilities operating at 1,000 watts ERP or less, locating on any existing radio transmission tower that has been [either] approved as a conditional use or allowed under Section 33.274.035” are allowed without a conditional use and are exempt from the regulations of Portland’s Zoning Code (Title 33).<sup>38</sup> Section 33.274.035 allows certain facilities, including new towers in certain areas to be installed without a conditional use review.

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<sup>35</sup> National Associations’ Comments, 9-16.

<sup>36</sup> *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights-of-Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of PCIA – The Wireless Infrastructure Association and the DAS Forum (A Membership Section Of PCIA) (July 18, 2011) (“PCIA’s Comments”), Exhibit B, 8.

<sup>37</sup> Portland’s Comments, 10.

<sup>38</sup> Portland City Code (PCC) 33.274.030(L).

**B. PCIA Takes Issue With Having To Meet With Affected Neighborhoods Although This Smooths The Siting Process To The Benefit Of Industry**

PCIA also complains of various “right of way issues” and among them includes a complaint that Portland requires tower companies to meet with affected neighborhoods prior to applying to install facilities in the right-of-way.<sup>39</sup> There is no explanation offered for why PCIA thinks this is an “issue” or what should be done about it. Presumably, PCIA would rather not have tower companies hold these neighborhood meetings. However, as the City pointed out in its initial comments, in actual fact the neighborhood meeting requirement was added to smooth what had otherwise sometimes been a contentious process, and the City considers it to have been an improvement.<sup>40</sup> The PCIA approach suggests that PCIA or its members simply do not grasp a point AT&T makes in its comments: even if a City approves a tower site, neighborhood opposition may in fact make it impossible to build a tower. In the City’s experience, if a provider is willing to confront neighborhood concerns honestly, and to adjust its designs to address legitimate concerns *in advance* of commencing construction, it is far more likely that opposition will be more muted. The contrary is also true: if the City must tell homeowners “we are sorry, but your concerns are of importance to us, but the Commission has adopted a rule that requires us to permit construction without public input,” the *only* remedy will be for neighborhoods to organize opposition to the carriers who will use the towers, and to those who lease property to the homeowners. The fact that the PCIA misses this very basic point suggests that it and at least

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<sup>39</sup> PCIA’s Comments, Exhibit B, 9.

<sup>40</sup> Portland’s Comments, 12-13, 15. In fact, AT&T complained that many landlords refuse to rent space to tower providers, even when permitted by local rules, because of neighborhood opposition. *See In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights-of-Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of AT&T (July 18, 2011) at 11. (“Even landlords that initially express interest will very often buckle under such pressure and withdraw their offer, because they want good relations with their neighbors and do not want to be the target of a public campaign.”)

some of its members need to become familiar with zoning and permitting processes, and why public involvement is ultimately a plus, and not a negative for legitimate providers. This is something that the Commission could perhaps facilitate through its own field hearings; regulations would be a mistake.

## **VI. THE COMMISSION SHOULD FOCUS ITS EFFORTS ON ISSUES OF FEDERAL CONCERN SUCH AS RF EMISSIONS**

The City supports the comments filed by Montgomery County, Maryland, and joins the County in urging the Commission to focus its efforts to encourage broadband deployment, not on regulating local governments, but on education and issues such as RF emissions.<sup>41</sup> These are matters clearly within the Commission's jurisdiction and ones that cry out for federal leadership. The City urged the Commission to work with other responsible federal agencies to update RF emission studies in 2009 to no avail.<sup>42</sup> With the proliferation of smartphones and other wireless devices, the need for action is more pressing today than ever. It would be a more appropriate use of Commission resources to address the significant amounts of misinformation circulating in cyberspace. As more antennae are deployed, public concerns and misperceptions over RF issues are likely to increase, not decrease.<sup>43</sup> A failure of the Commission to provide easily accessible and current information merely lends apparent credence to those who oppose *any* antennae placement, anywhere, anytime.

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<sup>41</sup> *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights-of-Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of Montgomery County, Maryland (July 18, 2011) ("Montgomery County's Comments"), 40-42.

<sup>42</sup> For example, see Resolution No. 36706 of the City Council in May 2009 requesting the Commission to work on revisiting and updating studies on the potential health concerns arising from RF emissions, attached hereto as Exhibit 2.

<sup>43</sup> See, e.g., Siddhartha Mukherjee, "Do Cellphones Cause Brain Cancer?", *New York Times Sunday Magazine* (April 13, 2011) (reviewing twenty years of research studies on cellphone exposure and cancer risks.) [http://www.nytimes.com/2011/04/17/magazine/mag-17cellphones-t.html?\\_r=1](http://www.nytimes.com/2011/04/17/magazine/mag-17cellphones-t.html?_r=1) (last accessed September 29, 2011).

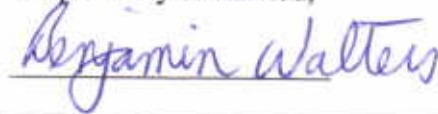


## CONCLUSION

None of the industry commenters present anything but anecdotes and adjectives in support of their claims that broadband is being deterred or delayed. The facts show otherwise in Portland, and it turns out that claims contained in the initial comments are simply a rehash of claims that were rejected after consideration by the courts of an extensive litigation record; or based upon a misreading of the City Code and its requirements; or based on a misunderstanding of the importance of public participation to smoothing the way to broadband deployment and adoption. As we said in our initial filing, our policies and procedures are designed to protect important local interests. We work closely with industry and the community to develop successful and timely procedures, to put as much information as possible online for prospective applicants, and to encourage applicants to meet with the knowledgeable City staff who can guide them through the application process. The result is the City's permitting process has been praised by industry. There is no evidence that the policies have impaired any company from providing broadband service here, and there are many reasons to believe that federal regulations would prove costly and disruptive to our community, and stifle our efforts to develop innovative and flexible processes.

September 30, 2011

Respectfully submitted,



Mary Beth Henry  
Deputy Director  
**Office for Community Technology**  
1120 SW 5<sup>th</sup> Avenue  
Portland, Oregon 97204  
(503) 823-5414  
[MaryBeth.Henry@portlandoregon.gov](mailto:MaryBeth.Henry@portlandoregon.gov)

Benjamin Walters  
Chief Deputy City Attorney  
**City Attorney's Office**  
Room 430  
1221 SW 4th Avenue  
Portland, OR  
(503) 823-4047  
[ben.walters@portlandoregon.gov](mailto:ben.walters@portlandoregon.gov)

# **EXHIBIT 1**

**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

**TIME WARNER TELECOM OF  
OREGON, LLC**, an Oregon Limited Liability  
Company, and **QWEST  
COMMUNICATIONS CORPORATION**, a  
Delaware Corporation,

CV 04-1393-MO

PLAINTIFFS,

v.

**THE CITY OF PORTLAND**, an Oregon  
Municipal Corporation,

DEFENDANT.

**EXPERT REPORT OF ALAN PEARCE, Ph.D.**  
**Information Age Economics, Inc.**  
**202-466-2654**

**A. INTRODUCTION**

1. I am President of Information Age Economics, Inc. (IAE), a Washington D.C.-based research and consulting firm. I founded IAE in March, 1978, after serving for approximately eight years in senior-level positions with the U.S. Government, first as Chief Economist and Special Assistant to two Chairmen of the Federal Communications Commission (FCC), Dean Burch and Richard E. Wiley, then as Chief Economist of the House of Representatives Telecommunications Subcommittee, under the Chairmanship of Cong. Torbert H. Macdonald and Cong. Lionel Van Deerlin, and finally as Senior Telecommunications Economist and Policy Adviser in the Office of Telecommunications Policy, Executive Office of the President. I attended The London School of Economics

and Political Science, University of London, as both an undergraduate and graduate student, and have a Ph.D. in Business and Telecommunications from Indiana University. My resume, litigation experience, and publications are attached.

2. In connection with the preparation of this report, I reviewed the documents listed in the attached Appendix 2: Reference Materials, along with the amended complaint in this case, Judge Jelderks' decision in *Qwest v. City of Portland* (March 22, 2002), the Ninth Circuit's decision on appeal thereof (October 12, 2004), the Ninth Circuit's decision in *City of Auburn v. Qwest*, as amended (July 10, 2001), and the FCC's decision in the *Pittencrieff* case (October 2, 1997). I worked with Michael F. Carlo, M.B.A. in gathering the information used in this report. Mr. Carlo worked under my direction and supervision.

3. Based on my training and my experience in the telecommunications industry, I was asked to express an opinion on the following issues:

- a. From an economic standpoint, is there reason to conclude that the statutes, regulations or legal requirements challenged by plaintiffs "may prohibit" entry? I conclude that there is no evidence to suggest that the regulations "may prohibit" entry, based on a comparison with other communities of similar size, and on general economic principles.
- b. From an economic standpoint, is there reason to conclude that the City's approach to telecommunications franchising promotes competition? Is there reason to conclude that the existence of the City's IRNE network promotes competition? I answer both questions in the affirmative, based on a comparison of Portland to other Cities, and on data that suggests that

IRNE's entry into the market enhances opportunities for competition.

Indeed, an examination of the relative numbers of competitive telecommunications services providers in the comparable cities, listed below in this report, clearly demonstrates that the city of Portland has a relatively large number of competitive providers, representing a significant indication that the city's regulatory policies have not inhibited competitive entry. On the contrary, competitive entry has been enabled by the city's pro-competitive policies. In sum, the City of Portland has fully lived up to the goals and spirit of The Telecommunications Act of 1996.

- c. Is there reason to find that the "in-kind" requirements contained in the Portland franchises are part of a "fair and reasonable" compensation package for use of the rights of way in light of industry practices, and are nondiscriminatory and competitively neutral? I conclude that the "in-kind" requirements are fair and reasonable, and fairly common within the telecommunications industry in transactions where one entity provides a resource (whether rights of way or conduit) to another. In-kind "payments" are not new in the telecommunications-information industry having existed as a common business practice since before World War Two. In-kind merely refers to another form of "payment," for example the performance of "free" services and/or the provision or sharing of facilities. Major telecommunications companies, for example BellSouth, Southwestern Bell, and Verizon, among others, publicize websites that specialize in the sharing of conduits and rights of way, where a variety of

deals and methods of payment can be struck, see Appendix 2 for a list of carrier websites and pole attachment literature. I also conclude that the requirements imposed upon telecommunications providers here are relatively similar, and are both non-discriminatory and competitively neutral. Moreover, the management of the rights of way program does effectively allow for competition while balancing the interests of the taxpayers in the city of Portland.

**B. ASSUMPTIONS UNDERLYING REPORT; TERMS.**

4. I have been asked by the attorneys for the City to assume that all the challenges raised by plaintiffs relate to “statutes, regulations or legal requirements,” within the meaning of 47 U.S.C. § 253, even though I understand that City contends that several of plaintiffs’ challenges raise issues that are not the proper subject of a Section 253 challenge. I have prepared this report consistent with this assumption so that I could address contentions raised by plaintiffs. I have no opinion one way or the other as to the validity of the assumption.

5. I refer to Plaintiff Qwest Communications Corp below as QCC. The term “Qwest” refers to the incumbent local exchange carrier, an affiliate of QCC. I refer to plaintiff Time Warner Telecom of Oregon LLC as “TWTC” or “Time Warner.” IRNE is Portland’s “Integrated Regional Network.”

6. In this report, I summarize my opinions and the current bases for those opinions, based on the information reviewed thus far. As I review additional information I may revise the opinions expressed in this report, add additional opinions, or both.

### **C. BACKGROUND**

7. Section 253 of the Telecommunications Act of 1996 preempts local laws and regulations that “prohibit” or have the “effect of prohibiting” the “ability” of any entity to provide “telecommunications services,” subject to certain exceptions spelled out in Sections 253(b) and (c). The term “telecommunications services” refers only to transmission services provided on a common carrier basis. The term does not include a wide variety of services that a lay person might consider telecommunications services, such as Internet access service.

8. Neither the Act nor the decisions of the Ninth Circuit tells us precisely what is meant by the terms “may prohibit” or “effectively prohibit.” What is clear is that Section 253 was part of a major rewrite of the nation’s telecommunications laws designed to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”

9. This overall goal, read together with the plain language of Section 253 suggests that it is important to keep basic economic principles in mind when determining whether a particular requirement may prohibit or effectively prohibits the ability of an entity to provide telecommunications services - at least where there is no direct evidence that a particular plaintiff actually has been prohibited from providing a service. That is because it is easy to confuse the effects of regulation with the effects of a competitive market. In a competitive market, we assume some companies will fail, for a variety of reasons; that is actually a desirable outcome. Likewise, in a competitive market we expect incumbent local exchange carriers like Qwest and Verizon to lose customers to new entrants. The

fact that companies are going out of business or losing customers does not, in and of itself, tell us whether competition is being inhibited by regulation, or fostered.

10. The FCC has suggested that the relevant issue is whether a challenged regulation “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,” See F.C.C. Rec 1735 (October 2, 1997).

**D. APPLYING ECONOMIC PRINCIPLES - WHAT MUST ONE SHOW TO PROVE THAT A POLICY MAY PROHIBIT ENTRY?**

11. One way to approach the Ninth Circuit’s “may prohibit” test would therefore be to consider the basic characteristics of competitive marketplaces, and to adopt tests that are consistent with the operation of those marketplaces.

- a. In a competitive marketplace, providers have distinct advantages one over another. Often advantages are accompanied by disadvantages.

Companies that “own” facilities may have advantages over companies that “lease” from them, but the former may require substantial upfront capital that lessees do not require. Not only is it difficult, it is inadvisable to remove these so-called advantages because their removal distorts competition, which rewards the most effective provider of services over the long-term, and results in an efficient allocation of resources. This is true whether the competition is between two private entities, or a public and a private entity. For example, municipalities might have certain so-called “tax-free” advantages but are subject to what might be regarded as serious business disadvantages because they are subject to referendum and voting obligations. In this context, it should be obvious that the FCC’s



reference to a “fair and balanced” *legal and regulatory* environment does not require elimination of economic advantages or disadvantages generally, including those which in a marketplace would flow from control of assets. Policies that involve transactions or behavior similar to that which occurs in competitive markets should not be treated as “prohibitory,” except perhaps in cases where the activity would violate the antitrust laws.

- b. In a competitive marketplace, individual customers will switch from one provider to another, and, over time, may switch several times. The mere fact of switching is not proof that there are barriers to entry. Of course, when Buyer A chooses Seller A over Seller B, Seller B may feel that it is being “prohibited” from providing service, but it is not in any meaningful economic sense. The choice is the necessary result of the marketplace and is precisely what we want to occur. It is for this reason that in antitrust contexts, one cannot generally show a competitive harm merely by showing a loss of customers. Rather, except in very rare circumstances one must show harm to consumers or product users in the context of a relevant product and geographic market.
- c. Nor is it a barrier to entry when sellers and buyers engage in swaps of goods and services, or choose to deal with one another for reasons other than strictly price. In a competitive marketplace, if Buyer A has an asset that Seller A needs or can use, Seller A may well be willing to provide service at a lower, or even at no cost, in order to obtain that asset; the

Seller can and should take into account what the Buyer brings to the table.

In a competitive marketplace, Buyers and Sellers may choose to deal with one another even where there are cheaper price alternatives for reasons of quality of service, trust, or other intangibles

- d. In a competitive marketplace, competitors pay for resources that are used to provide products or services. In a competitive marketplace, charges for use are not limited to out-of-pocket expenses, but also reflect the value of the property used. Policies that require payment at value are consistent with a “fair and reasonable” marketplace
- e. As a basic matter of economics, while an entity that wishes to use property should pay for the use of that property, it does not follow that the owner of the property must also make a payment for its use. Owners are generally entitled to the use of their own property. Hence, the fact that an owner does not pay the same amount for use of its own ROW as does a lessee - even a lessee that competes with the owner - is not, standing alone, prohibitory in an economic sense. Allegations that IRNE uses the ROW with terms and conditions different from others, even if true, would merely reflect a typical condition of ownership. Ownership is merely one among many competitive factors, some of which may favor one or more competitors over others. Policies that recognize differences in ownership, are consistent with a “fair and reasonable” marketplace.
- f. In a competitive marketplace, we encourage companies to resolve disputes through contract, and we allow for differences in contract between one

customer and another customer. Even in regulated marketplaces, a regulated company and its customers generally are allowed to agree to contract terms, and regulatory agencies are expected to uphold those terms except in exceptional circumstances. This process allows parties to establish terms and conditions that take into account, for example, differences between one customer and another, and changes between the time one contract was signed and another negotiated.

- g. In addition to the fee provisions that are at issue in this case, I understand that Qwest and Time Warner are challenging several “non-fee” provisions that the City claims (i) are not prohibitory; and (ii) are protected by subsections of Section 253 that protect from preemption, for example, requirements related to right of way management, and requirements related to compensation for use of the rights of way. My focus at this stage is on the prohibition claims. In deciding whether a non-fee provision is “prohibitory” it is important to recognize that the sort of non-fee provisions at issue here balance competing and complementary interests of government, the public and telecommunications providers. For example, suppose that government did not manage the rights of way in downtown Portland at all, and that as a result, telecommunications providers were able to enter the rights of way at a very low short-term cost. But, if, as a result, downtown streets deteriorated, access to local businesses were blocked, the overall impact could be to reduce the market for telecommunications service in the downtown area. More directly, if

the location of facilities in the rights of way is not known, the cost of future entry may increase in terms of the cost of locating facilities, rerouting lines, damage to facilities, and so on. Hence, efficient right of way management will attempt to balance both short term and long term costs. From the standpoint of telecommunications providers, generally it should not be enough to show that a non-fee provision causes it to incur costs, at least absent some quantification that shows that a reasonably efficient company could not remain in the marketplace and comply with requirements. Rather, because right of way management costs may cause short-term inconvenience while yielding substantial long-term benefits, from an economic standpoint to establish a prohibition it should be necessary also to show both that the costs are substantial and that the benefits are outweighed by the costs.

12. Basing a "prohibition" claim on IRNE's entry into the marketplace raises particularly troubling issues. IRNE does not, and is not in a position to provide all the communications services desired by its customers. Rather, IRNE provides important local connections that allow users to communicate with one another more efficiently, to increase usage without substantially increasing expenses and to reach points where services (such as local exchange service, long distance services and Internet services) can be purchased from a variety of competitive providers.

13. One of the traditional problems in the telecommunications marketplace is that incumbent local exchange carriers, like Qwest, have priced services well above the rates that would be expected in a competitive marketplace. They have been able to do so in

part because of control over key elements of the communications network which provide them a unique ability to service certain customers. If IRNE construction of facilities breaks local distribution bottlenecks, it may open the door to additional competition among private companies.

14. As suggested above, in a competitive market, we would expect buyers to be able to switch sellers, and we would expect that buyers might use different strategies - joint purchasing, vertical integration and so on -- to avoid becoming captive customers of companies with market power. To the extent that IRNE allows users to create products tailored to their own requirements (products which may not even be offered by traditional participants in the marketplace) it would enhance competition, not harm it. In a study in the February 2005 issue of *Applied Economic Studies*, researchers assessed whether public investments in communications networks crowds out private investment. The study showed that no such crowding out occurred and that "the empirical model indicates that municipal communications actually increases private firm entry."<sup>1</sup>

15. In addition, to the extent that IRNE helps Portland schools and governments deliver services (including emergency services) more efficiently, it may enhance the overall attractiveness of the Portland region to companies, and make the area a more attractive market for businesses generally and for telecommunications providers. That is, IRNE may enable schools and governments to communicate and provide services in new ways, without increasing government expenditures. This in turn may enhance the overall health of the Portland region, and increase the overall size of the telecommunications

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<sup>1</sup> George S. Ford, "Does Municipal Supply of Communications Crowd-out Private Communications Investment? An Empirical Study. *Applied Economic Studies*, February 2005. p. 9.

marketplace. To put it another way, the telecommunications marketplace is not static. If IRNE's entry (or Portland's right of way franchising and management policies, or both) help increase the size of the communications marketplace, IRNE's operations will not be prohibitory.

16. With respect to IRNE, plaintiffs' challenge to IRNE should be rejected unless they are able to demonstrate, at a minimum, that IRNE has a long term effect of reducing business opportunities in the telecommunications marketplace in Portland. This research demonstrates the opposite: That the market is growing and thriving. There is also evidence that IRNE has created competitive opportunities.

**E. THE RESEARCH: PORTLAND'S CONTRACTS WITH WIRELINE TELECOMMUNICATIONS PROVIDERS**

17. The initial aspect of the research involved a review of Portland's existing franchise agreements with Point-to-Point and Competitive Local Exchange Carrier (CLEC) franchisees, and the Temporary Revocable Permit held by Qwest. For each of the contracts and the TRP, specific attention was given to the fee structure (per linear foot or revenue percentage), scope and duration of the contract, sales and leasing provisions, and any "in-kind" requirement provisions, in part because it is my understanding that those issues have been the focus of the disputes in this case, and in part because those provisions are the provisions that directly involve payments to the City in the form of cash, services, or facilities. More specifically, the review focused on:

- Contract start date and term
- Type of rate structure (linear foot vs. revenue percentage)
- Selling and subleasing provisions
- In-kind requirements<sup>2</sup>

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<sup>2</sup> All contracts available at Portland Website - <http://www.portlandonline.com/index.cfm?c=33150>

In assessing the contract provisions, the research detected and tracked the transformation of contracts from basic to increasingly market driven over the period from 1990 through 2005. Generally, the review of the City of Portland's telecommunication franchise agreements finds that the agreements are largely similar:

(a) Exclusive of temporary arrangements, all agreements to date have been for ten years.

(b) Setting aside the Qwest TRP, all agreements with private companies have required that the provider include some element of in-kind remuneration, in the form of incremental ducts for the City's use whenever a provider undertook construction projects. In addition, some of the contracts contain what amount to distinct business deals established where a provider planned construction through a facility that is not under the control of the City (this is true for the QCC contract). It is my understanding the Qwest TRP does not include an "in-kind" provision because of state law limits on the fee that can be charged to Qwest. However, Qwest overall pays a higher amount, in absolute dollars, than does QCC or Time Warner.

(c) The Agreements between the City and IRNE also call for remuneration, and also provide for what might be characterized as "in-kind" rights. There is, however, an obvious and important distinction between an IRNE installation and a private installation. Even without an agreement, it is far from obvious that IRNE would be able to refuse a directive to install facilities on behalf of other city departments, or refuse to share facilities with other City departments.

(d) Point-to-point carriers were required to pay an annual fee based on linear footage included in the contracts. Rates increased each year based on an inflation-related algorithm. All CLEC contracts called for 5% of gross revenues generated as an annual fee.

(e) Starting in 1997, agreements incorporated a provision that the City of Portland would receive 1 % of the revenue generated from the sale of ducts to other providers.

(f) The agreements also began to include a provision giving the City of Portland a percentage of revenue associated with the sub-lease of ducts in 1997. Initially this fee amounted to 1% of associated revenues. In certain contracts, the fee increased to 5%. In other instances, specifically with the CLEC agreements, this provision was not included in more recent contracts:

### *Summary of Franchise Agreement Provisions*

<u>Provider</u>	<u>Type</u>	<u>Start Date</u>	<u>Linear Footage</u>	<u>Cost per Rev. or Lin. Foot</u>	<u>Sell</u>	<u>Lease</u>	<u>In Kind</u>
AT&T Long Distance	Pt-to-Pt	1/15/1990	78,750	\$ 3.15	0%	0%	Yes
PT Cable	Pt-to-Pt	10/25/2000	25,200	\$ 3.15	0%	0%	Yes
WorldCom	Pt-to-Pt	2/26/1997	5,600	\$ 2.80	0%	0%	Yes
Sprint Communications	Pt-to-Pt	9/4/1997	56,084	\$ 3.16	0%	0%	Yes
Qwest Communications Corp.	Pt-to-Pt	12/31/1997	14,038	\$ 3.01	0%	0%	Yes
WC1 Cable	Pt-to-Pt	9/30/1998	60,000	\$ 3.11	1%	1%	Yes
360 Networks	Pt-to-Pt	11/12/1998	125,000	\$ 3.01	1%	1%	Yes
FTV Communications	Pt-to-Pt	11/12/1998	18,730	\$ 3.04	1%	1%	Yes
Will Tel	Pt-to-Pt	11/8/2000	17,100	\$ 3.04	1%	1%	Yes
Broadwing Communications, LLC	Pt-to-Pt	11/8/2000	45,000	\$ 3.04	1%	5%	Yes
Tyco Networks (U.S.), Inc.	Pt-to-Pt	5/22/2002	110,000	\$ 3.12	1%	5%	Yes
MCI Metro	CLEC	10/23/1995		5%	0%	0%	Yes
Electric Lightwave, Inc.	CLEC	8/19/1996		5%	0%	0%	Yes
Enron Broadband Services	CLEC	5/26/1997		5%	1%	1%	Yes
Time Warner Telecom	CLEC	9/4/1997		5%	1%	1%	Yes
Level3	CLEC	1/17/2000		5%	1%	1%	Yes
TCG Oregon	CLEC	2/8/2000		5%	1%	1%	Yes
McLeod USA Telecommunications	CLEC	12/4/2000		5%	1%	5%	Yes
XO Communications	CLEC	12/4/2000		5%	1%	5%	Yes
AboveNet	CLEC	2/13/2001		5%	1%	0%	Yes
All Phase Utility	CLEC	6/20/2001		5%	1%	0%	Yes
OnFiber Communications	CLEC	9/16/2001		5%	1%	0%	Yes
Integrated Network Regional Enterprise (IRNE)	CLEC	5/26/2003		5%	1%	5%	Yes with modifications

## **F. RESEARCH AND KEY FINDINGS: GENERAL COMPETITIVENESS**

18. As a next step in our research, we sought to determine whether Portland's telecommunications policies were likely to promote competition or whether instead they may prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications services. We did so by comparing the state of competition in Portland with that in comparable cities. If Portland's markets are as competitive or more competitive than comparable communities, that would be an indication that its policies



result in a “fair and balanced” marketplace that may not prohibit or effectively prohibit entry. Also, and particularly if Portland provides a valuable marketplace for telecommunications providers, there is good reason to defer to the assessments of the value of that marketplace reflected in contracts between the City and telecommunications providers.

### ***The Comparison***

19. The first step in identifying a list of comparable cities was to review the U.S. Census Bureau’s Statistical Abstract of the United States: 2004-2005.

20. Like many American cities, Portland serves as an economic center for a larger metropolitan area. As an urban core, cities like Portland will provide highly concentrated and efficient operating locales for many industries, including telecommunications. Also, as an economic core for commercial entities, including corporate operations and retail, the urban sector offers significantly greater revenue opportunities for telecommunications service providers, including the ILEC, the CLECs, and Private Point-to-Point companies. Given this economic and business reality, the analysis focused on cities with an overall residential population within 100,000 inhabitants of Portland’s 2003 residential population of 539,000. Thus, this study’s initial pool of cities comparable to Portland was limited to those cities with residential populations between 439,000 and 639,000 in 2003. This filter resulted in the inclusion of 20 cities in the initial sample.

21. Given the favorable disproportionate contribution that cities like Portland provide in the broader adjacent metropolitan areas, the study then incorporated the population of the overall metropolitan areas of the above referenced sample cities. In this case, the study established a metric for metropolitan areas within an interval of 30% higher and lower than Portland. In 2003, Portland’s metropolitan area had a population of

2,040,000. In assessing an interval of 30%, the study identified metropolitan areas with residents from 1,428,000 to 2,652,000 in 2003. This interval size also showed a fairly distinct demarcation from data points beyond the interval.

22. The two demographic filters to identify cities most proximate to Portland in size and economic scope are:

- a. Cities with resident populations within 100,000 of Portland's 539,000 inhabitants;
- b. Of the cities identified in (a), only those cities with metropolitan areas within a 30% interval around Portland's metropolitan area population.<sup>3</sup>

23. Based on these filters, the cities which are most comparable to Portland for purposes of our analysis are:

<b>Portland, OR</b>	<b>539,000</b>	<b>2,040,000</b>
<b>Charlotte, NC</b>	<b>585,000</b>	<b>1,437,000</b>
<b>Cleveland, OH</b>	<b>461,000</b>	<b>2,140,000</b>
<b>Denver, CO</b>	<b>557,000</b>	<b>2,301,000</b>
<b>Kansas City, MO</b>	<b>443,000</b>	<b>1,905,000</b>
<b>Las Vegas, NV</b>	<b>517,000</b>	<b>1,577,000</b>
<b>Milwaukee, WI</b>	<b>587,000</b>	<b>1,514,000</b>
<b>Sacramento, CA</b>	<b>445,000</b>	<b>1,975,000</b>
<b>Virginia Beach, VA</b>	<b>439,000</b>	<b>1,637,000</b>

24. For a complete list of cities considered, please review Appendix A.

25. Once the comparable cities had been identified, the next phase of research involved contacting each city individually to determine the methodology by which they assess and manage telecommunications right-of-way issues. The research began with a review of publicly accessible information on city-specific Internet sites. At least one

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<sup>3</sup> U.S. Census Bureau, Statistical Abstract of the United States: 2004 - 2005. Large Metropolitan Statistical Areas - Population: 1990 to 2003 and Incorporated Places with 100,000 or More in Habitants.

representative in each city was contacted. In nearly all cases, the cities cooperated with the research to the best of its ability. The cities provided information on the fee structures used in each location (linear foot, percentage of revenue, etc.), the actual fees being charged, the duration of agreements, and the inclusion of alternate fee types, such as in-kind charges, subleasing fees and sales fees. If further research indicates that any of the information provided to us was in error, we will make appropriate adjustments.

26. In addition to population in a given market, the economic value of a franchise will also be determined by the purchasing power available to the people residing in that market. Given the importance of income level to the provision and purchase of enhanced telecommunication services, the study considered broader economic statistics available through the U.S Department of Commerce's Bureau of Economic Analysis.

27. In several of the communities identified, localities are limited to recovering certain costs by state law. Telecommunications providers may pay little or nothing to use the rights of way in those states. In other communities, the fee structure appeared comparable to Portland. While there are plainly markets where providers pay lower fees, and are not subject to the same type of right of way management regulations, Portland's market is among the most competitive and potentially most lucrative for a telecommunications provider. Additionally, the fees charged by the city of Portland fall within the range of the comparable cities and were applied consistently among Portland's franchisees.

### ***Cities Analyzed***

28. *Charlotte, N.C.* The city of Charlotte, North Carolina, has very few procedures in place to manage telecommunications ROW issues. Currently, the city is considering

legislation to formulate a plan to better balance the public interest with the telecommunications industry. The fee for a temporary easement in Charlotte is \$500. No additional fees are charged. The city representative acknowledges it can do a better job in managing the process. Without any structure in place, all road repairs and other related costs are borne entirely by the taxpayers, at an annual cost estimated in the millions of dollars. While Charlotte has slightly more providers than Portland, roughly 30 telecommunication providers, Charlotte does not attempt to manage the ROW function in manner which covers the cost of infrastructure degradation or recovery.

29. *Cleveland, OH.* Cleveland, Ohio, does not appear to have a department that addresses telecommunications ROW. No references exist on the city's website nor does anyone within the government bureaucracy seem to know the appropriate contact.

30. *Denver, Co.* Since 2001, the city of Denver has been unable to charge a fair value rent for use of the rights of way and it also does not recover all costs associated with use of the rights of way; it instead charges a nominal fees to cover the costs of administration of the ROW application. Costs associated with infrastructure degradation must be borne by the taxpayers of the city or of the state. Denver has only five active telecommunications companies currently operating in Denver.<sup>4</sup>

31. In 1997, the city of Denver's charged \$2.84/ft. for arterial ROW and allowed a provider to choose to pay 5% of gross revenues in lieu of the per foot fee. In subsequent years, this fee was increased in proportion to the Consumer Price Index (CPI). The per foot fee charged by Denver was noticeably higher than that being charged by Portland at the same time.

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<sup>4</sup> Conversation with Darrin Zuehlke, Office of Telecommunications, City of Denver, May 19, 2005.

32. In its 1997 policy, Denver also stated that “the city may accept or require in-kind compensation from rights-of-way users in lieu of all or a portion of fixed fees.”<sup>5</sup>

33. *Kansas City, MO.* Kansas City, Missouri, relies on legislation from the 1940s, which was modified in the 1960s, to manage its telecommunications and ROW matters. The city requires a nominal business license fee, in addition to requiring 6% of gross revenues for residential accounts and 10% of gross revenues for commercial accounts. Certain service revenues are considered exempt from the fee on gross revenues.

34. Kansas City has not been active in managing the ROW situation since the passage of the Telecommunications Act of 1996.<sup>6</sup> Kansas City currently has roughly 20 telecommunication providers with approval to operate within the city.<sup>7</sup>

35. *Las Vegas, NV.* By Nevada state law, Las Vegas may charge a maximum of 5% of retail intrastate gross revenues as a fee for a business license, franchise or public right-of-way. The City may require provision of in-kind facilities rather than cash payments. Currently, Las Vegas demands the maximum allowable payment of 5% from its providers.<sup>8</sup> The City of Las Vegas has eight franchised providers in its ROW program.<sup>9</sup>

36. *Milwaukee, WI.* The City of Milwaukee, Wisconsin is limited by state law to cost-based fees for use of the rights of way. However, Milwaukee also owns its own conduit system and leases that conduit to telecommunications providers. The rents for

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<sup>5</sup> Denver Council Bill No. 612, Ordinance No. 628, 1997. Ordinance was later ruled to be contrary to state constitution in matter City & County of Denver v. Qwest in 2001.

<sup>6</sup> Interview with Bill Geary, Kansas City Counsel on April 14, 2005.

<sup>7</sup> Interview with Bill Geary, Kansas City Counsel on May 19, 2005.

<sup>8</sup> Interview with Christopher Wallace, Franchise Officer, City of Las Vegas, April 7, 2005.

<sup>9</sup> Interview with Christopher Wallace, Franchise Officer, City of Las Vegas, May 19, 2005.

conduit are not limited to cost. For conduit that does not involve river crossings, the fees can be up to \$2.85 per linear foot per year. The charges for river crossings are significantly higher, up to \$105 per linear foot per year.

In addition, if a provider needs to install conduit from the City system to its own conduit system (essentially linking two systems together), or from one City-owned manhole to another (as may occur if City conduit between the two manholes is already full), the provider must (a) deed the conduit installed to the City and (b) install additional conduit for the City, which is also deeded to the City.<sup>10</sup>

37. *Sacramento, CA.* Sacramento, California does not charge telecommunications providers a rent for a franchise to use rights of way. It does impose a cost-based street cut fee, which appears designed to take into account costs that do not appear to be accounted for directly in permitting fees imposed by other communities examined in this study. Sacramento bases its fees on the age of city streets. The fee structure appears to be designed to capture the loss of street life caused by street cuts. In the case of newest streets, the fees can range from \$3.50 per linear foot for longitudinal streets up to \$7.00 for transverse excavations. For the oldest streets (over 15 years old), the rate is from \$1.00 to \$2.00 per linear foot. The scale is a sliding scale based on age.<sup>11</sup> Because of limits imposed by state law, the city does not have any franchise agreements with telecommunications providers and does not receive any supplemental revenue once the

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<sup>10</sup> Interview with Randolph Gshwind, Information and Technology Management, City of Milwaukee, April 14, 2005.

<sup>11</sup> Sacramento City Resolution 97-537.

streets have been repaired. Currently, the city has approximately seven telecommunications providers in operation.<sup>12</sup>

38. *Virginia Beach, VA.* Virginia Beach characterizes itself as being subject to a very restrictive state law with regard to telecommunication rights-of-way issues. Virginia Beach believes these restrictions prevent it from imposing a rent for use of the rights of way, or from recovering (through permitting fees) all the costs caused by telecommunications providers who use the rights of way. While telecommunications must apply for a permit before engaging in certain activities in the rights of way, the obligation of the provider is to ensure the right-of-way used is restored. No fee structure exists. The city had imposed a \$1 fee per residential and commercial line, but withdrew the charge. The city does not feel it can effectively control costs associated with right of way use given the state legislation.<sup>13</sup> Currently, Virginia Beach has five telecommunications providers in operation.<sup>14</sup>

39. The research suggests that Portland's policies have resulted in very competitive entry compared to other communities.

#### ***Comparison to Portland's Business Climate***

40. In its "Metro Area and State Competitiveness Report 2004," the Beacon Hill Institute, lists Portland, Oregon, as the third best competitive metropolitan area of the 50 largest metropolitan areas<sup>15</sup> in the United States. The report assessed metropolitan areas

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<sup>12</sup> Interview with Dave Colliman, ROW Streets Management, City of Sacramento, May 23, 2005.

<sup>13</sup> Interview with Bill Macali, General Counsel, City of Virginia Beach, April 19, 2005.

<sup>14</sup> Interview with Bill Macali, General Counsel, City of Virginia Beach, May 23, 2005

<sup>15</sup> Virginia Beach is included in the Norfolk metropolitan area.

in the categories of (1) Government and Fiscal Policy, (2) Security, (3) Infrastructure, (4) Human Resources, (5) Technology, (6) Business Incubation, (7) Openness and (8) Environmental Policy. Of the comparable cities included in this report, Portland ranks first overall and in the critical business related categories.<sup>16</sup> In analyzing the core business climate variables included in the Beacon Hill study, this report focuses on ten variables most critical to economic growth. When assessing these variables, Portland also led the comparable cities, with Denver a close second. This data also suggests that Portland has created a competitive environment for telecommunications providers.

	<u>Portland</u>	<u>Denver</u>	<u>Kansas City</u>	<u>Charlotte</u>	<u>Milwaukee</u>	<u>VA Beach</u>	<u>Las Vegas</u>	<u>Sacramento</u>	<u>Cleveland</u>
Overall Rating									
Peer Group Rating									
Government Index	4	7	3	1	6	2	5	9	8
Bond Rating	4	6	3	1	7	2	9	8	5
Infrastructure Index	4	3	5	2	6	7	1	9	8
Broadband Penetration	3	5	8	5	5	5	2	1	9
Technology Index	3	1	2	5	6	7	9	4	8
New Patents Issued	1	6	8	2	3	9	3	7	5
Business Incubator Index	4	7	6	8	9	5	3	2	7
Employer Births	3	1	5	7	8	5	2	4	9
New Publicly Traded Cos	2	1	3	5	6	9	4	7	8
Venture Capital Investment	4	2	6	5	8	3	9	1	7

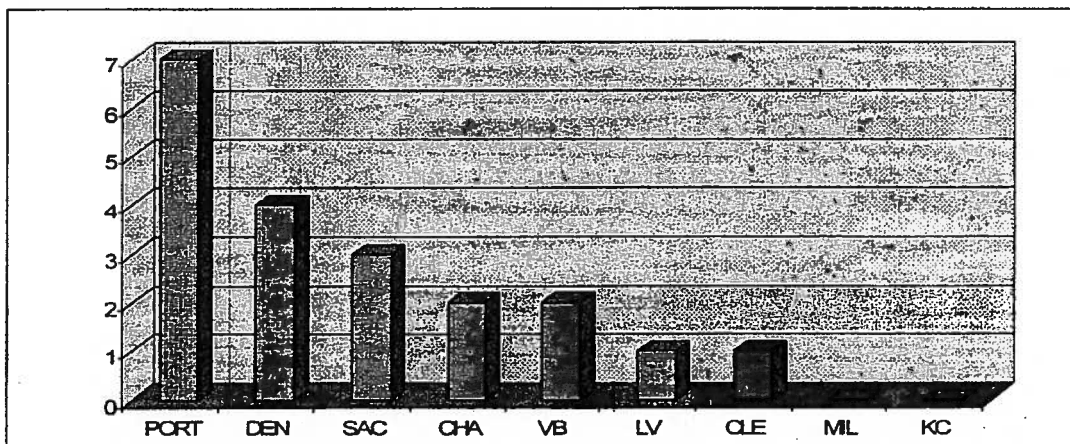
### **Business Total Peer Group Rating**

41. The city of Portland receives its highest marks in its ability to encourage innovation and in creating new businesses. In the 2004 Inc. Magazine list of 500 fastest growing privately held companies, Portland hosted seven of the top 500, leading the other comparable cities by a significant margin.<sup>17</sup>

<sup>16</sup> "Metro Area and State Competitiveness Report 2004," The Beacon Hill Institute at Suffolk University.

<sup>17</sup> Listing of companies is available at [www.inc.com/resources/inc500](http://www.inc.com/resources/inc500).





### *Economic Value to Franchisee*

42. In determining the value of the telecommunications ROW to a telecommunications provider, the revenue that can be generated in the community is a significant consideration. From the perspective of a franchisee, an agreement for 1,000 linear feet in Manhattan is significantly more valuable than a franchise for 1,000 linear feet in Tupelo, MS. Manhattan has greater population density and significantly higher purchasing power, which will result in an opportunity for the franchisee to realize higher revenues.

43. In this part of the analysis, local economic and demographic data were reviewed and analyzed in an attempt to determine relative value. Overall, telecommunications service revenues are influenced by various factors, including population density, economic growth, the business environment, educational and other skills of the population, employment opportunities, local governments' roles in attracting business, local tax policy, etc., that contribute to the demand for voice, data, video, and other services. Of these variables, population density, population growth and personal income are most readily measured.

44. Using ordinal ranking in these three variables, Denver demonstrates the best combination of the population density, population growth and personal income. Portland, Sacramento and Cleveland follow.

	Population Density	Population Growth	Personal Income	Total Score
1 Denver	6	2	2	10
2 Portland	5	4	3	12
2 Sacramento	3	5	4	12
2 Cleveland	2	9	1	12
5 Las Vegas	4	1	8	13
6 Milwaukee	1	8	6	15
7 Charlotte	7	3	7	17
8 Kansas City	9	6	5	20
9 Virginia Beach	8	7	9	24

45. The importance of population density in assessing the value of the ROW is clear. The more people per linear foot a city has, the more potential customers per linear foot and the greater the expected revenue potential. In a more densely populated area, the firms will gain more revenue per linear foot. In assessing the comparable cities, Portland falls directly in the middle - meaning telecommunications providers in Portland have an opportunity to receive average revenue per linear foot based on the population density variable.<sup>18</sup>

Milwaukee, WI	6,108.2	(residents per square mile)
Cleveland, OH	5,940.7	
Sacramento, CA	4,578.2	
Las Vegas, NV	4,563.1	
Portland, OR	4,013.4	
Denver, CO	3,631.0	
Charlotte, NC	2,414.4	
Virginia Beach, VA	1,768.0	
Kansas City, MO	1,413.1	

<sup>18</sup> U.S. Census Bureau, Statistical Abstract of the United States: 2004-2005, Incorporate Places with 100,000 or More Inhabitants in 2003.

46. As metropolitan areas add inhabitants and commercial entities, the value of the linear foot fee structure continues to increase. Since 1990, rates in Portland and other cities have increased in proportion to inflation, during a period of low inflation. In the same metropolitan areas, the number of inhabitants has increased at a much higher rate than overall inflation. In Portland, the base rates for the first franchise agreements were set in 1990. From 1990 - 2003, the comparable cities and their metropolitan areas have all grown:<sup>19</sup>

<b>Las Vegas, NV</b>	<b>85.6%</b>
<b>Denver, CO</b>	<b>30.7%</b>
<b>Charlotte, NC</b>	<b>29.9%</b>
<b>Portland, OR</b>	<b>26.5%</b>
<b>Sacramento, CA</b>	<b>21.3%</b>
<b>Kansas City, MO</b>	<b>12.2%</b>
<b>Virginia Beach, VA</b>	<b>8.7%</b>
<b>Milwaukee, WI</b>	<b>4.8%</b>
<b>Cleveland, OH</b>	<b>2.2%</b>

47. In assessing the comparable cities, Portland falls above the median for population growth-meaning telecommunication providers in Portland have an opportunity to receive above average revenue per linear foot based on the population growth variable

48. Finally, once the people have moved to a metropolitan area and are fairly densely populated, a critical remaining piece to creating customers for telecommunications companies is income level. With a higher personal income level, greater expenditures can be made on items such as telecommunications services. According to the Bureau of Economic Analysis (BEA), overall personal income in each metropolitan area for 2002, in millions of dollars, was:<sup>20</sup>

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<sup>19</sup> U.S. Census Bureau, Statistical Abstract of the United States: 2004-2005, Large Metropolitan Statistical Areas - Population: 1990 to 2003.

<sup>20</sup> Information on personal income is available through Bureau of Economic Analysis [www.bea.gov](http://www.bea.gov).

<b>Cleveland, OH</b>	<b>136,756</b>
<b>Denver, CO</b>	<b>129,650</b>
<b>Portland, OR</b>	<b>85,439</b>
<b>Sacramento, CA</b>	<b>75,149</b>
<b>Kansas City, MO</b>	<b>74,810</b>
<b>Milwaukee, WI</b>	<b>73,730</b>
<b>Charlotte, NC</b>	<b>72,648</b>
<b>Las Vegas, NV</b>	<b>51,652</b>
<b>Virginia Beach, VA</b>	<b>50,180</b>

49. In assessing the comparable cities and their relative economic scale and purchasing power, Portland falls near the top in personal income - meaning telecommunication companies serving the Portland area have an opportunity to receive significantly more revenue per linear foot based on the metropolitan area's personal income level.

50. In assessing the population density, population growth and personal income, the research demonstrates that the City of Portland offers a strong combination of these three characteristics. When the city's favorable business environment is factored into this analysis, it is clear that Portland offers significant economic value to its telecommunications franchisees.

51. Based on the foregoing, I conclude:

- a. There is evidence, based on comparison to the state of competition in other markets, that, in an economic sense, Portland's telecommunications policies are pro-competitive, and do not have and are not likely to prohibit or effectively prohibit entry into the market. This is true as to both the fee and the non-fee provisions.
- b. Given this environment, there is little reason to suppose that the contracts entered into by CLECs and point-to-point carriers are unfair, or fail to

reflect a fair marketplace valuation of the rights of way in Portland. The agreements themselves suggest that Portland's policies may not prohibit entry or have the effect of prohibiting entry.

- c. There is evidence that Portland has created a business environment that provides benefits to telecommunications providers, and could fairly charge a higher fee for use of the rights of way in Portland than is charged in other Cities.
- d. In their complaint, QCC and TWTC accuse the City of Portland of creating an environment that is not in the spirit of the Telecommunications Act of 1996. On the contrary, the research clearly indicates that the City of Portland has created an environment that serves the competitive goals of the Act. An examination of the relative numbers of competitive telecommunications service providers in the comparable cities clearly demonstrates that the city of Portland has a relatively large number of competitive providers which is a significant indication that the city's regulatory policies have not inhibited competitive entry. On the contrary, competitive entry has been enabled by the city's pro-competitive policies. In sum, the City of Portland has fully lived up to the goals and spirit of the Act in connection with its management of the ROW and the charges for the use of that right of way, as indicated by the comparison to other markets and by the terms of the contracts themselves.

#### **G. KEY FINDINGS: IN-KIND PROVISIONS**

- 52. A central contention of QCC and TWTC is that the in-kind provisions of their contracts are particularly objectionable, presumably because the City may be able to use

those facilities to avoid purchasing services from QCC and TWTC, and because IRNE may obtain advantages in its efforts to provide services or facilities to other governmental entities. In-kind provisions are commonplace in the telecommunications-information industry, see Paragraph 3 c. above, and a list of Regional Bell websites listed in Appendix 2.

53. This assumes that in the private marketplace, in-kind compensation is uncommon, or that companies refuse to enter into arrangements that may be helpful to a competitor. That is not the case. In reality, each element of in-kind compensation has a monetary value. In the case of the city of Portland, the in-kind compensation was incremental duct being laid in already planned locations. When one views the overall franchisee fees, including the monetary value of the in-kind provisions, the city of Portland certainly falls within the range of the comparable cities.

54. From an economic standpoint, there are several reasons why a company may choose to provide in-kind benefits rather than cash. First, if the in-kind facility is of more value of equal value to a seller than cash, the seller may be willing to take in-kind benefits in lieu of cash; likewise, if a buyer can provide an in-kind facility and reduce cash outlays, it may be worthwhile to provide the in-kind benefit. This is particularly so where (as is true here), the in-kind benefit can be provided relatively cheaply as part of a larger project, where a company may gain economies of scale and volume discounts for the in-kind requirements.

55. A seller and buyer may agree to in-kind arrangements where doing so may reduce costs and potential risks to both parties. Suppose, for example, that a company wishes to place a facility along a railroad ROW, and the railroad may wish to use similar facilities

at some point in the future. If the railroad builds along the ROW later, there may be a risk of harm to the facilities of its lessee, or there may be costs and disruption associated with the installation. The parties could agree at the outset who would bear those costs and risks; or they could agree to terms (such as provision of facilities in-kind) that minimize the risks. In the case of Time Warner Telecomm Inc., the company admits that it “benefits from its relationship with Time Warner Cable, an affiliate of Time Warner, Inc., both through access to local rights-of-way and construction sharing costs.”<sup>21</sup>

56. Third, a competitor may agree to arrangements that may have a beneficial impact on the overall marketplace. As I mentioned above, if one impact of IRNE is to make government and educational institutions more efficient, the effect may be to increase the overall market for telecommunications services, or to make it easier to serve certain customers (this is particularly true for companies that do not have facilities throughout the community). There is evidence I discuss in the next section that IRNE has eliminated some bottlenecks to competition, for example.

57. There is no reason to assume that the in-kind provisions are inherently anticompetitive or prohibitory. In-kind provisions may be of particular benefit to new entrants into the marketplace who may wish to reduce cash outlays or other operational risks.

58. Based on a comparison of the contracts for telecommunications franchisees in the city of Portland, the in-kind provisions appear substantially similar, and do not appear to unfairly disadvantage any company.

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<sup>21</sup> US Securities and Exchange Commission report, Time Warner Telecom Inc. 10-Q, June 30, 2004, p. 13.

## **H. KEY FINDINGS: IRNE**

59. In an effort to streamline government services, while significantly reducing the growth in telecommunications costs to the city and its taxpayers, Portland introduced the Integrated Regional Network (IRNE) in 2001. The organization's goals include providing a cohesive, redundant communications infrastructure that will allow a multitude of government agencies to communicate on secure fiber lines at high speeds and low cost. Currently, IRNE provides voice and data services to all government bureaus of the City of Portland, along with data services to the following agencies<sup>22</sup>:

- Oregon State Department of Transportation
- Oregon State Department of Administrative Services
- Portland Public Schools
- Multnomah County
- Multnomah Educational Service District
- City of Hillsboro Police Department

60. As I suggested at the beginning, IRNE's entry into the marketplace as a competitor may have a number of pro-competitive effects. The research regarding the general state of competition in Portland certainly suggests that IRNE is not now having an anticompetitive effect. There is evidence that IRNE's presence has actually itself resulted in greater competition in Portland among private companies, thus serving the pro-competitive goals of the Telecommunications Act. For example, TWTC complains in an internal e-mail that it lost a contract to serve Metro to another private provider because Metro was able to take service at a local telecommunications hotel thanks to IRNE.

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<sup>22</sup> Documentation provided via factual background summary and interviews with Terry Thatcher, General Counsel, City of Portland and Mark Gray, Portland's Office of Communication and Networking.



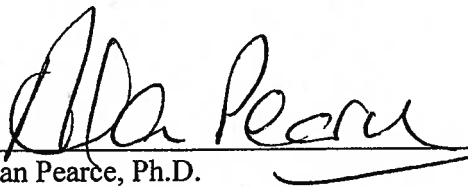
61. To understand TWTC's email, it helps to have a little background on the telecommunications industry. Telecommunications providers often bring facilities to one or more central locations in a market where providers can interconnect with one another and exchange traffic. From these "telecommunications hotels" or "meet me" points, individual systems run to various parts of the community. If a retail customer such as a business has its own connection to the hotel, it could potentially buy telecommunications services from a large variety of providers. If the business does not reach the hotel directly, it must either purchase all its services from someone who reaches its offices, or lease connections back to the hotel. It may have very limited choices in this regard, and so it may not be able to obtain services at truly competitive prices. What TWTC is complaining about in the email is that Metro was able to use IRNE facilities to get to a point where it could purchase services at competitive rates. TWTC is complaining that absent IRNE, it would have been the only provider capable of serving Metro.<sup>23</sup> In this instance, stopping IRNE would have reduced competition in the telecommunications marketplace.

62. Another case of enhanced competition has also been brought to my attention. When the Portland School District began using IRNE, instead of the local incumbent telecommunications firm (Qwest Corporation, an affiliate of plaintiff QCC) to obtain access to the local "telco hotel," that also opened more ISP options. In that case, ironically, the District dropped an ISP run by the State of Oregon's government and hired one of the plaintiffs in this case, Time Warner.

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<sup>23</sup> Email from Jon Nicholson to Brian Thomas regarding IRNE Service to Metro, August 11, 2004.

63. I have also reviewed the reports of interviews with IRNE customers. All the customers interviewed report that their level of data service has improved and costs have dropped or remained constant since switching to IRNE. Those are results one would wish to see in a competitive market and they appear to be the direct result of IRNE's operations. That is to say, consumers of telecommunications have been benefited by IRNE's presence in the market.

  
Alan Pearce, Ph.D.

Date: 9/1/05

## APPENDIX 1: COMPARABLE CITIES ANALYSIS

### *Comparable Cities Analysis*

<u>City/Metro Area</u>	<u>2003 City Pop.</u>		<u>2003 SMSA Pop.</u>	
San Antonio	1,215,000			
San Jose	898,000			
Indianapolis	783,000			
Columbus	728,000			
Austin	672,000			
Milwaukee	587,000	Ft. Worth	5,590,000	
Charlotte	585,000	Washington, DC	5,090,000	
Ft. Worth	585,000	Boston	4,440,000	
El Paso	584,000	Seattle	3,142,000	
Boston	582,000	Denver	2,301,000	<i>Denver</i>
Seattle	569,000	Cleveland	2,140,000	<i>Cleveland</i>
Washington, DC	563,000	Portland	2,040,000	<i>Portland</i>
Denver	557,000	Sacramento	1,975,000	<i>Sacramento</i>
Nashville	545,000	Kansas City	1,905,000	<i>Kansas City</i>
Portland	539,000	Virginia Beach	1,637,000	<i>Virginia Beach</i>
Oklahoma City	523,000	Las Vegas	1,577,000	<i>Las Vegas</i>
Las Vegas	517,000	Milwaukee	1,514,000	<i>Milwaukee</i>
Tucson	508,000	Charlotte	1,437,000	<i>Charlotte</i>
Albuquerque	472,000	Nashville	1,371,000	
New Orleans	469,000	New Orleans	1,318,000	
Cleveland	461,000	Oklahoma City	1,133,000	
Fresno	451,000	Tucson	893,000	
Sacramento	445,000	Fresno	850,000	
Kansas City	443,000	Albuquerque	765,000	
Virginia Beach	439,000	El Paso	705,000	
Atlanta	423,000			
St. Louis	332,000			
Pittsburgh	325,000			
Tampa	318,000			
Cincinnati	317,000			
Buffalo	285,000			
Orlando	199,000			
Providence	176,000			

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### **APPENDIX 3: QUALIFICATIONS, PUBLICATIONS, AND PRIOR TESTIMONY**

#### **Qualifications**

Dr. Alan Pearce founded Information Age Economics in March 1978 after a senior level policy career in the U.S. Government from 1970-78.

As one of the prime architects of public policy at the Federal Communications Commission in the 1970s, Dr. Pearce helped lay the foundation of a new information era. Beginning in 1970, Dr. Pearce was chief economist and special assistant to FCC Chairman Dean Burch and later to his successor Richard Wiley. In that capacity, he was responsible for economic policy research and design pertaining to all major matters pending before the FCC. During a five year tenure in the Office of the Chairman at the Commission, Pearce oversaw the investigation of AT&T, which eventually led to the breakup of the company in 1984; the early policies that encouraged the convergence of computers and communications; the launching of domestic satellites to provide telecommunications-information-entertainment services to the public; the beginning of public policies encouraging the development of cable TV; and wireless and spectrum policies that resulted in the introduction of universal wireless services.

Dr. Pearce next became chief economist, Subcommittee on Telecommunications, U.S. House of Representatives, where he was responsible for developing legislation and monitoring the telecommunications-information-entertainment industry via hearings, consultations, and reports.

After leaving the House, Dr. Pearce joined the Office of Telecommunications Policy in the Executive Office of the President, as chief economist and senior policy adviser. He was responsible for coordinating policy research and developments emanating from the many federal departments and agencies that hold industry regulatory authority.

Since leaving the government, Dr. Pearce has provided professional services to telecommunications, wireless, satellite, cable TV, movie and program production companies, and broadcasting corporations, along with software and equipment manufacturers. He has also consulted with a wide variety of government organizations at the international, federal, state, and local levels.

Pearce has assisted clients in the U.S. and overseas with negotiations on privatizations and appropriate regulatory structures (Great Britain, France, South Korea, Australia, Mexico, etc.), antitrust issues and actions, mergers and acquisitions, appraisals and valuations, franchises, and service rates. He has lectured and written on international business and the telecommunications-information-entertainment industry both domestically and globally. He is the author of several books and is on the faculty of the Center for Telecommunications Management at the University of Southern California.

In addition, Dr. Pearce has worked with a number of successful entrepreneurial ventures, including the Adaptive Corporation and its parent, Network Equipment Technologies; Alert Systems, Inc.; BrightLink; Ciena Corporation; CustomerLinux; HTLT Software; ITGlobalSecure; Link America; LynkLabs; Pete's Brewing Company; Quixotic Solutions, Inc.; and SignalSoft, among others.

Prior to coming to the U.S. in 1968, Pearce worked as both a newspaper and TV journalist, and was foreign editor of Independent Television News in London. He was also Chairman of The London Radio and Television Branch of the National Union of Journalists.

Dr. Pearce holds bachelor and master degrees from The London School of Economics and Political Science, University of London, and a doctorate in business and telecommunications from Indiana University.

### Publications

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As Chief Economist at the Federal Communications Commission (FCC) and, later, for the House of Representatives Subcommittee on Communications, I researched and wrote a variety of public policy papers on advertising directed toward children, sex and violence on television, the costs of cable TV regulation, the economic impact on professional sports of the anti-TV Blackout Legislation, the investigation of Western Electric and the Bell System, satellite and wireless communications systems, and international telecommunications.

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Network World, August 16, 1993, OPINIONS; Regulatory Issues; Pg. 37,  
819 words, Hundt a good choice for users.

Network World, January 25, 1993, OPINIONS; The Transition; Pg. 30,  
496 words, Clinton-Gore drafting team of policymakers.

Network World, December 16, 1991, OPINIONS; Regulatory Affairs; Pg.  
25, 874 words, FCC will proceed slowly but surely with action on PCNs.

Network World, November 4, 1991, OPINIONS; Regulatory Affairs; Pg.  
43, 827 words, FCC has rocky road ahead in streamlining AT&T rules.

Network World, October 7, 1991, OPINIONS; Regulatory Affairs; Pg.  
41, 742 words, Users won't see info services from the RBHCs this year.

Network World, September 16, 1991, OPINIONS; Regulatory Affairs; Pg.  
31, 771 words, Dean Burch: The industry owes him a debt of gratitude.

Network World, May 13, 1991, OPINIONS; Pg. 41, 859 words,  
Encouraging competition for the benefit of users worldwide.

Network World, March 18, 1991, OPINIONS; Regulatory Affairs; Pg. 39,  
830 words, FCC threatens foreign administrators on users' behalf.

Network World, February 18, 1991, OPINIONS; Regulatory Affairs; Pg.  
37, 794 words, The FCC should reallocate spectrum to benefit the public.

Network World, January 21, 1991, OPINIONS; The FCC; Pg. 31, 816  
words, In a litigious environment, the whole industry loses.

Network World, October 15, 1990, OPINIONS; Regulatory Policy; Pg.  
35, 814 words, MFJ restrictions force the RBHCs to invest overseas.

Network World, September 17, 1990, OPINIONS; AOS Providers; Pg. 37,  
800 words, The FCC's about to take a tiger by the tail.

Network World, August 20, 1990, FEATURES; Features; Pg. 1, 3027  
words, Bush's policy-making team one year later.

Network World, July 30, 1990, OPINIONS; Pg. 31, 1208 words, Will  
users benefit from telco entry into the cable industry?



Network World, July 23, 1990, FEATURES; Features; Pg. 26, 2746 words, Panic at the helm.

Network World, July 23, 1990, FEATURES; Pg. 28, 1108 words, The history of Computers I and II.

Network World, June 25, 1990, FEATURES; Feature; Pg. 1, 3389 words, Impending regulatory changes favor users.

Network World, May 28, 1990, OPINIONS; Regulatory Issues; Pg. 45, 890 words, Appeals Court ruling has far-reaching implications.

Network World, May 21, 1990, TOP NEWS; Pg. 1, 3715 words, NTIA Chief Obuchowski airs telecom policy views, By Alison Conliffe, Assistant Features Editor, and Alan Pearce, Contributing Editor.

Network World, April 30, 1990, FEATURES; Pg. 43, 2698 words, A capital question.

Network World, April 2, 1990, OPINIONS; Regulatory Policies; Pg. 31, 863 words, Current FCC rules are bad for American business.

Network World, December 4, 1989, FEATURES; Feature; Pg. 1, 2426 words, The lowdown on the new Bush FCC lineup.

Network World, September 18, 1989, OPINIONS; Regulatory Issues; Pg. 31, 941 words, The RBHCs still face roadblocks to MFJ relief.

Network World, July 17, 1989, OPINIONS; Tariffs; Pg. 31, 948 words, Congressional input valuable in telecom policy-setting.

Network World, May 29, 1989, OPINIONS; ONA; Pg. 27, 945 words, Problems continue to postpone the information age.

Network World, May 1, 1989, FEATURES; Pg. 53, 3155 words, Unfinished Business: The Bush administration, the FCC, the Justice Department and Congress have a roster of issues left over from the Reagan years.

Network World, April 17, 1989, OPINIONS; Tariffs; Pg. 31, 947 words, It's too early to give AT&T regulatory relief.

Network World, February 6, 1989, OPINIONS; ONA; Pg. 46, 552 words, The RBHCs should be urged to get on with it.

Network World, December 26, 1988 / January 2, 1989, FEATURES; Federal Regulation; Pg. 22, 569 words, What's in the cards; Industry experts look at the year to come.

Network World, October 3, 1988, FEATURES; Pg. 29, 3289 words, The making of a policy; The presidential candidates hold differing views on issues that will have a large effect on telecommunications policy.

Network World, August 15, 1988, FEATURES; Feature; Pg. 1, 2922 words, Is a radio days law fit for the Information Age?

Network World, July 18, 1988, OPINIONS; Modified Final Judgment; Pg. 35, 958 words, The Huber Report -- missing and presumed dead.

Network World, April 25, 1988, OPINIONS; ONA; Pg. 25, 952 words, The RBHCs' plans for ONA leave much to be desired.

Network World, April 4, 1988, FEATURES; Pg. 31, 2445 words, The men who would be president

Network World, February 8, 1988, OPINIONS; FCC Update; Pg. 26, 833 words, Lame-duck chairman.

Network World, November 30, 1987, OPINIONS; Telecommunications Law; Pg. 26, 837 words, Ginsburg's conversion.

Network World, November 9, 1987, OPINIONS; FCC Update; Pg. 30, 714 words, Then there were three.

Network World, October 19, 1987, OPINIONS; Modified Final Judgment; Pg. 36, 852 words, A second-rate decision.

Network World, September 14, 1987, OPINIONS; Regulatory Roundup; Pg. 26, 896 words, The trade imbalance.

Network World, August 3, 1987, OPINIONS; Revenue Regulation; Pg. 22, 749 words, Consider the alternatives.

Network World, July 13, 1987, OPINIONS; Washington Update; Pg. 26, 694 words, Democrat (Gore) is a technocrat.

Network World, June 8, 1987, OPINIONS; FCC Update; Pg. 22, 866 words, Influential intellectuals.

Network World, May 11, 1987, OPINIONS; Access Charges; Pg. 28, 700 words, FCC looks for trouble, gets it.

Network World, April 13, 1987, OPINIONS; Vendor Strategies; Pg. 22, 774 words, Don't underrate AT&T.

Network World, March 9, 1987, OPINIONS; Modified Final Judgment; Pg. 29, 648 words, Justice's Rx, with provisos.

Network World, February 9, 1987, OPINIONS; Washington Update; Pg. 37, 925 words, Au revoir, laissez-faire.

Network World, January 5, 1987, OPINIONS; Deregulation; Pg. 32, 1053 words, Slow wheels in motion.

Network World, November 17, 1986, OPINIONS; Regulation; Pg. 28, 1034 words, Prudent jurisprudence?

Network World, October 13, 1986, OPINIONS; Equal Access; Pg. 32, 831 words, Equal access a thorny issue.

Network World, September 15, 1986, OPINIONS; Standards; Pg. 30, 854 words, From Pots to Pans.

Network World, August 18, 1986 Correction Appended, OPINIONS; Policy; Pg. 26, 938 words, Modifying the Final Judgment.

Network World, July 14, 1986, OPINIONS; Policy; Pg. 29, 992 words, Scalia knows telecom industry.

Network World, June 9, 1986, OPINIONS; Washington, D.C.; Pg. 24, 961 words, How to regulate deregulation.

Network World, May 12, 1986, OPINIONS; Washington, D.C.; Pg. 22, 805 words, FCC musical chairs?

Network World, April 14, 1986, OPINIONS; Policy; Pg. 24, 1132 words, FCC sets back STS.

Network World, February, 1986, WASHINGTON, D.C.; Pg. 10, 908 words, Karl Brimmer, a Top FCC Aide.

Network World, December, 1985, WASHINGTON, D.C.; Pg. 16, 996 words, 1986: BOC Year of Living Flexibly?

Network World, November, 1985, WASHINGTON, D.C.; Pg. 20, 862 words,  
AT&T's CPE Victory: One Battle Won.

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Will Court Upset FCC Control?

Network World, September, 1985, WASHINGTON, D.C.; Pg. 20, 706 words,  
FCC's New Agenda: Computer III.

Network World, August, 1985, WASHINGTON, D.C., IBM/MCI/SBS The Deal;  
Pg. 18, 994 words, IBM-MCI Deal: A Boon to AT&T?

Network World, July, 1985, WASHINGTON, D.C.; Pg. 20, 919 words, FCC  
Accepts AT&T Private-Line Tariff.

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Should Big Blue Have a Computer II of its Own?

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Coalition Scores FCC Victory.

Network World, April, 1985, NEWS ANALYSIS; Pg. 9, 706 words,  
Southern Bells Attacked; Shared Tenant Services Questioned

Network World, April, 1985, WASHINGTON, D.C.; Pg. 20, 582 words,  
RBOCs' Bold New Strategy.

Network World, March, 1985, WASHINGTON, D.C.; Pg. 20, 842 words.

Network World, February, 1985, WASHINGTON, D.C.; Pg. 11, 689 words.

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Network World, October 3, 1984, WASHINGTON, D.C.; Pg. 14, 1314  
words, BOCs Ask for Trouble; Greene Delivers.

Network World, September 5, 1984, WASHINGTON, D.C.; Pg. 13, 1293  
words, AT&T Tariffs Inundate FCC.

Network World, August 1, 1984, WASHINGTON, D.C.; Pg. 13, 1264 words,  
Cable Wins, But Lacks a Full House.

Network World, May 2, 1984, WASHINGTON, D.C.; Pg. 12, 1297 words,  
The Great Quid Pro Quo.

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When Weaning Turns to Warring.

Network World, January 18, 1984, WASHINGTON, D.C.; Pg. 9, 1319  
words, AT&T at the Regulatory Forge.

#### 5. Articles Published in New York Law Journal

New York Law Journal, August 11, 1995, Pg. 5, 1239 words, Global Telecom Alliances Benefit  
Users. This article first appeared in Vol. XIII, No. 5 of Cable T.V. and New Media & Finance.

New York Law Journal, May 5, 1995, Pg. 5, 909 words, Wireless Competition Now, Consolidation  
Later. This article first appeared in Vol. XIII, No. 1 of Cable T.V. and New Media Law & Finance.

New York Law Journal, March 24, 1995, Pg. 5, 1124 words, What Are Telecom Prospects In 104<sup>th</sup>  
Congress? This article first appeared in Vol. XII, No. 11 of Cable T.V. and New Media Law &  
Finance.

New York Law Journal, April 23, 1993, Pg. 5, 1351 words, Telecommunications Policies in the  
Clinton Administration. This article first appeared in Vol. X, No. 12, Cable T.V. and New Media  
Law & Finance.

New York Law Journal, October 18, 1991, Pg. 5, 1602 words, Is Path Cleared for RBOCs To Offer  
Info Services? This article first appeared in Vol. IX, No 5, Cable T.V. and New Media Law &  
Finance.

New York Law Journal, February 20, 1998, Pg. 5, 826 words, WorldCom-MCI Merger Poses  
Several Thorny Policy Issues. This article first appears in Vol. XV, No. 11, Cable T.V. and New  
Media Law & Finance.

New York Law Journal, November 29, 1996, Pg. 5, 804 words, Competition for Directory  
Assistance: Of RBOCs & Others. This article first appeared in Vol. XIV, No. 8, Cable T.V. and  
New Media Law & Finance.

#### Prior Testimony:

- Senate Judiciary Committee, June 10, 1981, re International Telecommunications Services.
- House Telecommunications Subcommittee, May 27, 1981, re telecommunications-information-entertainment industry structure and regulation.

- House Committee on Small Business, September 23, 1983, re cable television multiple ownership issues.
- Postal Rate Commission, November, 1980, re postal rates for books and recording materials.
- California Public Utilities Commission, November 21, 1983, re Intra-LATA competition in the telecommunications industry.
- Nebraska Public Service Commission, September 18, 1986, re deregulation of telecommunications services.
- New Brunswick Board of Commissioners of Public Utilities, May 7-19, 1984, re competitive and deregulatory conditions in the telecommunications-information industry.
- Newfoundland Board of Commissioners of Public Utilities, April 12-15, 1988, re competition and deregulatory conditions in the telecommunications-information industry.
- Federal Communications Commission – at various dates and on various issues, i.e., broadcasting, cable TV, telecommunications, etc., throughout the 1980s & 90s.
- U.S. Tax Court, December 12 and 13, 1989, re cable TV franchising.
- U.S. Tax Court, September 18, 1986, re TV program syndication and investment tax credits.
- U.S. Court of Claims, February 11 & 15, 1987, re TV program syndication and ITCs.
- U.S. Bankruptcy Court, February 7, 1987, re Dama Communications bankruptcy and Data General's acquisition of Dama.
- Federal District Court in Las Vegas, NV, December 1 & 2, 1986, in Wayne Newton vs NBC.
- Federal District Court in San Diego, CA, February 8 & 11, 1991, re M/A COM and Digital Termination Services.
- Deposed in MCA/Disney, et al vs Sony in the Spring of 1978.
- Deposed in Dr. Steven Shearing vs Johnson & Johnson, June 2, 1988, re the value of Dr. Shearing's patents.
- Deposed in a case against United Cable, January 18, 1990, re value of minority ownership in the Baltimore, MD, cable TV system.
- California Tax Board, San Francisco, December 4 & 5, 1997, and July 13 & 14, 1998, concerning tax issues associated with Viacom's cable TV systems and Viacom's purchase of Paramount Studios.

- Deposed in case involving AirTouch Wireless, 1997.
- Retained by Office of Chief Counsel, Internal Revenue Service, in case against AT&T & GTE Wireless re wireless company contracts and wireless industry churn rates, June, 2000-July, 2001. Case settled.
- June, 2003: PASCOM vs Nationwide Insurance. Appraised the market value fire damaged fixed wireless equipment in an arbitration in Bethesda, MD, presided over by Judge John McAuliffe.
- December, 2003: Retained as expert witness for ITCDeltaCom in Wholesale Telecom Corporation v. ITCDeltaCom Communications, Inc., Case No. 03-60537, Federal District Court.
- 2003 & 2005: Retained by Department of Justice, Tax Division, in ten separate cases before the Federal District Court and the Court of Claims concerning Federal Excise Taxes imposed on Long Distance Telecommunications Services.
- Retained by City of Portland, Oregon, in Time Warner Telecom and Qwest Communications Corporation v. The City of Portland, United States District Court, District of Oregon.

# EXHIBIT 2



**RESOLUTION No. 36706**

Request the federal government to update studies on potential health effects of radio frequency wireless emissions in light of significant increases in wireless use.

WHEREAS, federal law preempts state and local governments, including the City of Portland, from considering health concerns in the regulation and placement of wireless facilities, so long as such facilities otherwise comply with applicable federal law; and

WHEREAS, the Federal Communications Commission (FCC) has jurisdiction over non-federal wireless facilities, authorizing and licensing all non-federal devices, transmitters and facilities that generate Radio Frequency (RF) radiation; and

WHEREAS, the FCC relies upon federal agencies with health and safety expertise, such as the Food and Drug Administration (FDA), the Environmental Protection Agency, the National Institute for Occupational Safety and Health, and the Occupational Safety and Health Administration which have assigned roles in federal law for monitoring and investigating issues related to RF exposure; and

WHEREAS, the Government Accounting Office in 2001 prepared a report of its investigation into safety concerns related to mobile phones, and concluded that further research into wireless technology is needed, recommending the FDA take the lead in monitoring research results; and

WHEREAS, the FCC in 2003 last updated guidelines for human exposure to RF electromagnetic fields from wireless facilities, based primarily on recommendations of other federal agencies after reviews of prior scientific literature related to RF biological effects, primarily from the 1990s; and

WHEREAS, a survey released in May 2009 from the Centers for Disease Control and Prevention concluded that for the first time the number of households in the U.S. with only a cell phone exceeds the number of households in the U.S. with only a landline phone;

NOW THEREFORE BE IT RESOLVED that the Portland City Council requests the FCC to work in cooperation with the FDA and other relevant federal agencies to revisit and update studies on potential health concerns arising from RF wireless emissions in light of the national proliferation of wireless use; and

BE IT FURTHER RESOLVED, that the Council Clerk shall cause a copy of this Resolution to be sent to all members of the FCC, to the FDA Commissioner, and to all members of the Oregon Congressional Delegation.

Adopted by the Council: **MAY 20 2009**  
Commissioner Amanda Fritz  
May 12, 2009

**LA VONNE GRIFFIN-VALADE**  
Auditor of the City of Portland

By

*Susan Parsons*  
Deputy